Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1998

WYNAT DEVELOPMENT COMPANY,
AN ORDINARY LOUISIANA PATNERSHIP,
AND WYNAT DEVELOPMENT CORPORATION
PETITIONERS

VS.

THE BOARD OF COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE
STATE OF LOUISIANA

ON PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Takings Clause of the Fifth Amendment permits the silent and implied repeal of a statute to be applied retroactively to divest pre-existing rights and bar a landowner's action for compensation for private property already taken and destroyed for public flood control purposes?

2. Where government activities have already taken, used and destroyed private property, do constitutional guarantees of Due Process and Just Compensation permit the subsequent repeal of a statute to relieve the government of its duty to provide compensation for the property already taken?

3. Whether the Due Process Clause of the Fifth and Fourteenth Amendments prohibit the silent and implied repeal of a statute by judicial intervention, to be applied retroactively so as to deny Petitioners the backward-looking relief necessary to protect pre-existing vested rights and a fair opportunity to seek compensation for property previously taken and destroyed for public purposes prior to the declaration of invalidity?

LIST OF PARTIES

PETITIONERS:

Wynat Development Company is an ordinary Louisiana Partnership consisting of Natchez A. Morice, D.D.S. and Jack Wyatt. There are no other persons, affiliates or subsidiaries connected thereto.

Wynat Development Corporation is a Louisiana corporation located in the City of New Orleans and has no subsidiaries or affiliates.

RESPONDENT:

The Board of Commissioners of the Orleans Levee District, a political subdivision of the State of Louisiana, located in the City of New Orleans, is the primary agency charged with flood control for the Parish of Orleans.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

PETITION FOR WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....7

REASONS FOR GRANTING THE PETITION.....11

1. Considerations Governing Review.....11

(a) Invalidation of Long Standing Law After The Taking Had Occurred.....12

(i) Repeal By Implication Not Favored and Should Never Disturb Vested Property Rights.....13

TABLE OF CONTENTS (continued)

PAGE

(ii) The Court's Decision Legislates New Law - Presumption Against Retroactivity Affecting Property Rights.....14

(iii) Petitioners Will Be Deprived of Fair Notice and Repose.....18

(iv) Interpretative Law Cannot Disturb Vested Property Rights.....20

CONCLUSION.....20

INDEX TO APPENDICES

APPENDIX A Opinion of the Louisiana Supreme Court.....A-1

APPENDIX B Denial of Timely Application For Rehearing.....A-25

APPENDIX C LA. R.S. 38:301 (Taking Statute).....A-28

APPENDIX D LA. R.S. 38:301, Annotation; Cross References-Prescription.....A-34

APPENDIX E Article XVI, § 6. LA. Const. 1921.....A-36

TABLE OF AUTHORITIES

PAGE

U.S. CONSTITUTION:

Fifth Amendment.....2,7,11,12,15,19,20

Fourteenth Amendment.....2,7,11,12,18,19,20

CASES:

Mayer v. Bd. of Commissioners, 150 So. 295 (La. 1933).....8

Givens v. Fifth District Levee Board, 445 So.2d 781 (La. Ct. App. 1984).....8,9,15

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).....9

First English Evan. Luth. Ch. v. Los Angeles City, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).....12,17

Jacobs v. United States, 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933).....12

Tennant v. Russell, 39 So.2d 726 (La. 1949).....12

Lott v. Haley, 370 So.2d 521 (La. 1979).....12,15,19

TABLE OF AUTHORITIES (continued)

PAGE

Landgraf v. USI Film Products, 511 U.S. 244, 144 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)...12,15,17,18,20

Williamson v. Vardeman, 674 F. 2d 1211 (8th Cir. 1982).....12,20

A.K. Roy, Inc. v. Bd. Of Commissioners, 111 So.2d 765 (La. 1959).....13,15

Wynat Development v. Bd. Of Commissioners, 710 So.2d 783 (La. 1998).....13

Rutherford v. Greene's heirs, 15 U.S. (2 Wheat.) 196, 4 L. Ed. 218 (1817).....13,14

U.S. v. United Continental Tuna Corp., 425 U.S. 164, 96 S. Ct. 1319, 47 L. Ed. 2d. 653 (1976).....14

West Jefferson Levee District v. Coast Const. Co., 640 So.2d 1258 (La. 1994).....16

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).....16

Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 117 S. Ct. 1871, 138 L. Ed. 2d. 135 (1997).....18

Fust v. Arnar-Stone Laboratories, Inc., 736 F.2d 1098 (5th Cir. 1984).....19

Cooper v. Lykes, 49 So.2d 3 (La. 1950).....19

TABLE OF AUTHORITIES (continued)

PAGE

State ex rel. Hills, Inc., v. Recorder of Mortgages, 186 La. 661, 173 So. 139 (La. 1937).....19

Cements v. State Dept. of Health, 391 So.2d 66 (La. Ct. App. 1980).....19

St. Paul Fire & Marine Ins. Co. v. Smith, 609 So.2d 809 (La. 1991).....20

LOUISIANA CONSTITUTION:

LA. Const. Ann. Art. I , § 23 (1974).....12

STATUTES:

28 U.S.C. § 1257(a).....2

LA. Rev. Stat. Ann. § 38:301 (West 1998).....3,15,16

LA. Rev. Stat. Ann. § 9:5626 (West 1998).....5,9,10,13,15,16,17,19

LA. Rev. Stat. Ann. § 13:5111 (West 1998).....6,9,10,13,19

LA. Civ. Code Ann. Art. 6 (West 1998).....15

LA. Rev. Stat. Ann. § 9:5628 (West 1998).....18

PERIODICALS:

Fallon & Meltzer, *New Law Non-Retroactivity and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991).....16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The highest state court to review the merits was the Louisiana Supreme Court whose opinion, with dissent, appears at Appendix A to this petition and is reported at 710 So.2d 783 (La. 1998).

JURISDICTION

The date on which the Louisiana Supreme Court decided this case was April 14, 1998.

In affirming the lowers courts, the Louisiana Supreme Court, in a case of first impression, held that a prescriptive statute in existence for forty years, that sustained petitioners right of action, was silently and impliedly repealed by a 1979 enactment of the legislature; the court applied its decision retroactively which barred petitioners' claim for compensation and dismissed the landowners' suit.

In a timely application for rehearing, a federal issue was

raised when petitioners' averred that the decision, if applied to past events (the taking), would divest pre-existing rights and would deny petitioners fair notice and a reasonable opportunity to seek just compensation for the land previously taken and used for public purposes, in violation of the rights guaranteed by the Fifth and Fourteenth Amendments.

The application for rehearing was denied by a divided court on June 26, 1998 and a copy of this order denying the rehearing appears at Appendix B, p. A-27.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. R.S. 38 § 301. Construction and maintenance of levees and drainage; care and inspection of levees; measure of compensation; right of entry
(See Appendix C for full text)

A. The levee boards and levee and drainage boards of this state may construct and maintain levees, drainage, and levee drainage, and do all other things incidental thereto. The levee boards and levee and drainage boards may do all drainage work incidental to or made necessary by the construction of the levee system in this or adjoining states. However, any construction project undertaken shall be in accordance with the provisions of R.S. 38:2211, et seq.

* * * * * *

C. (1)(a) All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

(b) The owner shall be given written notice of the appropriating resolution by the levee board within ten days of the date of its passage.

* * * * * *

(h) The measure of compensation for lands and improvements taken or destroyed for levee and levee drainage purposes by way of a permanent levee servitude shall be the fair market value of the property taken or destroyed before the proposed use of the property or construction of the levee facilities, without allowing any change in value caused by the construction of the levee facilities. The measure of damages, if any, to the remaining property of the owner by reason of the use or destruction of a portion of the property is determined on a basis of immediately before and immediately after the use or destruction of the property for levee drainage construction, taking into consideration the effects of the completion of the project in the manner proposed or planned.

(2)(a) The compensation due under the provisions of this Subsection shall be paid to the owner within one year after the actual taking, use, damage, or destruction of the property in accordance with the provisions of this Section.

(b) Immediately after the actual taking, use, damage, or destruction of the property, the levee board shall make an estimate of the compensation due under the provisions of this Section, and shall make an estimate of the revenues available to the levee board from all sources from which to make the payment of the compensation; however, the estimate of revenues shall not take into account any taxes levied after the time of the actual taking, use, damage, or destruction of the property, except such taxes as may be levied pursuant to authorization and approval by the voters in the district. If revenues available to the levee board are sufficient to pay the compensation due to the owner, the levee board shall pay the owner within one year of the actual

taking, use, damage, or destruction of the property.

(c) The amount of compensation due to the owner shall be paid from funds appropriated by the legislature by the office of public works of the Department of Transportation and Development. The levee board shall immediately notify the office of public works of the estimate of the amount of compensation due to the owner, the amount of revenues available to the board, and the amount of insufficient revenues. Upon such notification, the office of public works shall make its own estimate of the monies available to the levee board, and the amount of compensation to the owner. If the estimates of the levee board and the office of public works differ, the estimates of the office of public works shall be controlling.

La. R.S. 9:5626. Actions and claims for lands and improvements used or destroyed for levees or levee drainage purposes

When lands are appropriated for levees or levee drainage purposes all claims and actions for payment under Article XVI, Section 6 of the Constitution of 1921 for lands and improvements thereon actually used or destroyed for levees or levee drainage purposes shall prescribe within two years from the date on which the property was actually occupied and used or destroyed for construction of levees or levee drainage works, or, in the case of lands and improvements heretofore so occupied and used or destroyed, such prescription shall accrue two years from November 17, 1958. This prescription shall run against interdicts, married women, absentees, minors, and all others now excepted by law.

Added by Acts 1958, Ex.Sess., No. 11, § 1.

La. R.S. 13:5111 Appropriation of property by state, parish, municipality or agencies thereof; attorney, engineering and appraisal fees; prescription

A. A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency or any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding. Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding. Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.

B. The rights of the landowner herein fixed are in addition to any other rights he may have under the constitution of Louisiana and existing statutes, and nothing in this Part shall impair any constitutional or statutory rights belonging to any person on September 12, 1975.

Acts 1975, No. 434, § 1.

STATEMENT OF THE CASE

In 1983, the State of Louisiana, on behalf of the federal government, appropriated petitioners' property for a flood control project along the Mississippi River at New Orleans.

When petitioners' land was taken for public purposes, their right to be fairly remunerated became vested. This is an action for just compensation for the land taken and damages sustained as a result of the taking.

Petitioners have never been compensated for their property. As the facts will show, this case satisfies every requirement for the application of the Due Process and Just Compensation Clauses of the Fifth and Fourteenth Amendments. Private land was taken for public purposes and the landowners' pre-existing right to receive just compensation was barred after the taking by judicial invalidation of the existing law, in a matter of first impression.

A. Factual Background

The facts are not in dispute. Petitioners were the owners of land located on the Mississippi River across from the City of New Orleans. Due to levee instability in the area, the U.S. Army Corps of Engineers in May, 1976, commenced the remedial project that was designated as the "Algiers Point Levee Setback, Enlargement and Slope Paving-Phase II."

The federal agency requested that the State of Louisiana, acting through the defendant Board of Levee Commissioners, obtain the property needed to complete the aforesaid project. The state acquired the necessary rights of way

through a series of appropriating resolutions beginning in June, 1976 and ending in July, 1983, after which it turned the right of ways over to the U. S. Army Corps of Engineers.

Petitioner does not contest the government's right to appropriate its land for levee purposes but merely seeks payment of just compensation for property used, damaged and destroyed.

Although petitioners' land was appropriated in July, 1983, construction on the property did not commerce for 2 years and the property was not actually used and destroyed until December, 1985, when the construction was finally completed. La. R.S. 38:301C(1)(a).(See Appendix C, p. A-28)

After the construction was completed, following the procedures set out by State law, petitioners commissioned an appraisal to measure the damage caused by the taking, "determined on a basis of [the value] immediately before and immediately after" the completion of the project. La. R.S. 38:301(c)(1)(h). *Mayer v. Bd. of Commissioners,* 150 So. 295, 298 (La. 1933); *Givens v. Fifth District Levee Board,* 445 So.2d 781 (La. App. 1984).

State procedure also provided that the defendant taking agency had one year after completion of the work within which to assess damages and to pay any compensation due the landowner. La. R.S. 38:301C(2)(a). Again following procedure provided by the state, during this one year term of assessment, from December, 1985 to December, 1986, petitioner landowner and defendant Board of Levee Commissioners, negotiated, but could not agree upon the amount of just compensation due for the property taken and actually used, damaged and destroyed. (See Appendix A, p.A-2).

Within 4 months after the one year period for negotiation and payment expired without agreement on the amount due petitioners, on April 16, 1987, petitioners filed this action for just compensation for the property taken, used and damaged for public levee purposes.[1]

At all times pertinent hereto, there were two prescriptive statutes in existence that had some relevance to the subject taking, viz., a general law providing compensation for the taking of property by the state". . .other than through an expropriation proceeding. . ." shall prescribe three years from the date of such taking[2] and a specific law providing that lands appropriated for levees or levee drainage purposes "shall prescribe two years from completion of the project." [3]

Since under the taking statute, the measure of the damages could not be evaluated until completion of the project, La. R.S. 38:301 C(1)(a), it seems obvious that the prescriptive period should not commence until the project was completed. La. R.S. 9:5626, *Givens v. Fifth Levee District, supra.*

The defendant levee board filed an exception to petitioners' suit for compensation on the grounds of prescription of three years from date of notice of the taking as provided by

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[1] *Having followed all state procedures provided for seeking compensation for riparion land taken and used for levee purposes, this claim is ripe for review. Williamson County Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172, 194, 105 S.Ct. 3108, 3120, 87 L.Ed.2d 126 (1985).*

[2] *Act 434 of 1975, designated La. R.S. 13:5111. Petitioners argued to no avail that this statute only applied to inverse condemnation, thus the prescriptive period commenced only upon notice of the taking; because this property was taken with full legal procedure, it did not apply to a La. R.S. 38:301 taking.*

[3] *Act 11 of 1958 designated La. R.S. 9:5626.*

La. R.S. 13:5111. If this statute is the applicable law, petitioners' action for compensation was barred on August 15, 1986, being three years from notice of the taking, but four months prior to petitioners' right to receive payment matured.

In opposition to defendant's exception, petitioners offered La. R.S. 9:5626 as the applicable two year prescriptive period, which by its very terms, applies to claims for lands "used and destroyed for construction of levees." Since the two year period did not commence until the construction work was completed in December, 1985, its suit filed on April 16, 1987 was timely[4].

In 1996, the trial court held that the specific statute, La. R.S. 9:5626 enacted in 1958, was "silently" repealed by the general statute La. R.S. 13:5111, enacted in 1979. Therefore petitioners' claim for compensation for the 1985 taking was barred and their suit was dismissed.

A divided Court of Appeal affirmed the district court's judgment.

Since the issue was a matter of first impression, the Louisiana Supreme Court granted petitioners' writ application to determine the applicable prescriptive period for lands taken for levee purposes.[5]

The Louisiana Supreme Court, with one justice dissenting, affirmed the lower courts' judgment with circuitous

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[4] *The defendant has stipulated that the landowners' claim for just compensation is not barred if Section 5626 is the applicable statute.*

[5] *See Opinion, Louisiana Supreme Court, Appendix A.*

reasoning that the 1958 law was silently and impliedly repealed by a 1979 enactment of the legislature.

On application for rehearing, petitioners eschewed further discussion of the merits and argued that the court's invalidation of the 1958 statute constituted new law which, if applied retroactively to petitioners' pre-existing vested right to receive just compenstion, would violate federal and state constitutional guarantees of due process and just compensation.

By a plurality of 4 to 3, the application for rehearing was denied and petitioners' action was dismissed. (See Appendix B, p. A-27)

The petitioners now ask this court to determine the temporal reach of a court adjudication that establishes new law which, if applied retroactively, divests a landowner's preexisting vested right to just compensation under the Fifth and Fourteenth Amendments of the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. Considerations Governing Review

A state court of last resort has decided an important federal question pertaining to due process and just compensation in a way that conflicts with relevant decisions of this Court.

Petitioners filed this action for just compensation for land taken and used for public flood control purposes. Claims for just compensation are grounded in the Constitution

itself. *First English Evan. Luth. Ch. v. Los Angeles City,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), *Jacobs v. United States,* 290 U.S. 13, 545 S.Ct. 26, 78 L.Ed. 142 (1933).

A suit under the Just Compensation Clause seeks relief from a harm that has already been inflicted by the government and raises the bar of judicial review to its highest level. *First English Evan. Luth. Ch. v. Los Angeles City, supra* at 2387.

When the government appropriated petitioners' property for a public purpose, petitioners acquired a vested interest in being fairly compensated for the taking. *Id at 2380, 2381; Tennant v. Russell,* 39 So.2d 726 (La. 1949).

Even Louisiana law provides that once vested, petitioners' right to compensation could not be constitutionally divested. La. Const. Art. I Sec. 23; *Lott v. Haley* 370 So.2d. 521 (La. 1979).

The taking of property without due process is no less a violation of the Fifth and Fourteenth Amendments when it is done by the courts rather than the other branches of government, *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed 2d 229 (1994); *Williamson v. Vardeman,* 674 F. 2d 1211 (8th Cir. 1982).

(a) Invalidation Of Long Standing Law After The Taking Had Occurred

The Louisiana Supreme Court granted petitioners' writ application to address whether the prescriptive period that

governs petitioners' claim for compensation is that found in La. R.S. 9:5626 or La. R.S. 13:5111[6].

La. R.S. 9:5626 is so narrowly crafted that it only applies to riparian land taken for levee construction purposes. *A.K.Roy, Inc. v. Bd. of Commissioners,* 111 So.2d 765 (La. 1959). Conversely, La. R.S. 13:5111 is a general statute that applies to all takings, except by expropriation. *Wynat Development v. Bd. of Commissioners,* 710 So.2d 783 (La. 1998).

In 1983 and 1985, based upon sound legal advice at the time, petitioners relied on La. R.S. 9:5626, the prescriptive period specifically crafted for taking property for levee purposes. It is admitted by the defendant that if that statute is not repealed, petitioners' suit is not barred.

In the instant case, the Louisiana Supreme Court, in what this writer can only describe as a novel and unusual decision, held that the specific statute, La. R.S. 9:5626 in existence for 40 years, was silently and impliedly repealed by a general statute, enacted 19 years ago.[7]

(i) Repeals By Implication Are Not Favored and Should Not Disturb Vested Property Rights

This court has long held that repeals by implication are not favored. *Rutherford v. Greene's heirs,* 15 U. S. (2 Wheat.)

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[6] *This was a case of first impression and clearly establishes that La. R.S. 9:5626 was in existence both when petitioners land was taken and at the time petitioners filed suit for compensation.*

[7] *In other words, La. R.S. 9:5626 had been part of Louisiana law and utilized without question for 19 years after its repeal in 1979.*

196, 4 L.Ed. 218 (1817), *U.S. v. United Continental Tuna Corp.*, 425 U.S. 164, 96 S.Ct. 1319, 47 L.Ed. 2d. 653 (1976).

In *Rutherford v. Greene's heirs, supra*, Chief Justice Marshall speaking for the Court, declared at 203:

> "...Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property to which they may be fairly applicable, and not particularly applied by the legislature; *no silent, implied, and constructive repeals, ought ever to be so understood as to devest a vested right.*" (Emphasis Added)

That principle carries special weight when a court is urged to find that a specific statute has been impliedly repealed by a more general one. *U.S. v. United Continental Tuna Corp. supra.*

(ii) The Court's Decision Legislates New Law - Presumption Against Retroactivity Affecting Property Rights

Petitioners submit that the court's ex post facto "silent" repeal of a law in existence for 40 years, substituting in its place a different law that bars petitioners' claim for just compensation, constitutes new law of a substantive nature which cannot be applied retroactively to divest petitioners' vested

interest. La. Civil Code, Article 6; *Lott v. Haley,* 370 So.2d 521, 524 (La. 1979).

This court, speaking through Justice Stevens, in *Landgraf v. USI Film Products,* 114 S.Ct. 1483, stated at page 1497:

> "The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of just compensation."

It is beyond presumption that the "other government actors" referred to by *Landgraf* includes adjudications by the courts.

This is not a case where the landowners relied on a plainly unlawful statute nor could it be predicted that it would be impliedly invalidated 40 years after its enactment. To the contrary, La. R.S. 9:5626 has long been adhered to. *A.K. Roy, Inc. v. Bd. of Commissioners,* 111 So.2d 765 (La. 1959). It was judicially construed and acted on as recently as 1984, one year after taking in 1983, and one year before construction was completed in 1985. *Givens v. Fifth District Levee Board,* , 445 So.2d 781 (La. App. 1984).

In addition, the repealed law was construed by legal scholars as being the statute applicable to riparian land takings such as occurred here. In West's 1998 Louisiana Statutes Annotated, La. R.S. 38:301, Cross References, provides the folowing: (See Appendix D, p. A-35)

> "Prescription, actions and claims for lands and

> improvements used or destroyed for levees or levee drainage purposes, see R.S. 9:5626.

Further, the repeal lacked any express or clear legislative intent to repeal the statute.

In Fallon & Meltzer, *New Law Non-Retroactivity, and Constitutional Remedies,* 104 Harv. L.Rev. 1731 (1991)[9], examining the general problem of jurisprudence and the issue of retroactivity, "new law" was defined at 1763:

> ". . .legal rules and principles are new to the extent that, ex ante, their recognition as authoritative would have been viewed as relatively unlikely by competent lawyers."

Because there was no specific act or expressed legislative intent to repeal La. R.S. 9:5626, petitioners' counsel was without precedent or legal authority to declare the statute dead.[8] Only with judicial intervention could petitioners obtain a definitive answer of the laws validity.

This would require a property owner who claims just compensation for property taken for public purposes, to first file an action testing the validity of law relied upon before

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[8] *As an example of the lack of expression of repeal by the legislature, Chief Justice Calogero, of the Louisiana Supreme Court, in dissent, recently cited the statutes involved here, La. R.S. 9:5626 and La. R.S. 38:301 as part of the "statutory scheme" passed to implement Louisiana Constitutional directive.* ***West Jefferson Levee District v. Coast Const. Co.****, 640 So.2d 1258, 1302 (La., 1993).*

[9] *Cited by this Court in* ***Harper v. Virginia Dept. of Taxation****, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).*

seeking just compensation. This kind of impediment to claim compensation was disapproved of by this Court in *First English Evan. Luth. Ch. v. Los Angeles City,* 107 S. Ct. 2378, 2388.

It is not disputed that petitioners' land was permanently taken and destroyed for public flood control purposes. In *First English Evan. Luth. Ch., supra,* a case similar to the instant matter in principle, this court held that where the government's activities have already taken and used the property, no subsequent invalidation of the law or other action of the government can relieve the duty to provide fair compensation under the Just Compensation Clause. *Id at 2389*

Chief Justice Rehnquist explained that the Court's decision did not require the government to exercise the power of eminent domain, at page 2389,

> We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

In this instance, the government had already taken and destroyed the property in 1985. Therefore the court's subsequent repeal of the statute in bar of the payment of fair compensation is constitutionally insufficient. *Id. at 2388.*

It is respectfully submitted that by any definition, the Louisiana Supreme Court's ex-post facto invalidation of La. R.S. 9:5626, which was part of Louisiana law and adhered to for more than 40 years, constituted new law and should

not be applied retroactively to petitioners' pre-existing right to just compensation.

A presumption against retroactivity of new law affecting contractual or property rights in which predictability and stability are of prime importance, has long been recognized by this court. *Landgraf v. USI Film Products* 114 S.Ct. 1483, 1500 and cases cited. The presumption is deeply rooted in the jurisprudence. *Hughes Aircraft Co. v. U. S. ex rel. Schumer,* 117 S.Ct. 1871, 1876 (1997) citing *Landgraf.*

(iii) Petitioners Will Be Deprived of Fair Notice and Repose

No State shall deprive any person of property, without due process of law nor deny the equal protection of the laws. U. S. Const. Amdt. 14 Section 1.

The due process clause protects the interests of fair notice and repose that may be compromised by retroactive application of new law. *Landgraf* at 1497.

Elementary considerations of fairness dictate that an opportunity to know what the law is and to conform their conduct accordingly, should be afforded each individual *Ibid.*

The Louisiana Supreme Court's decision in 1998, commencing prescription from the date of notice in 1983, while repealing its commencement from completion of the project in 1985, shortened the existing period of limitation to file landowners' claims.

Statutes of limitation, being procedural and remedial in nature, are generally applied retroactively and prospectively unless they are unconstitutionally cast. *Fust v. Arnar-Stone Laboratories, Inc.* 736 F.2d 1098, 1100. Citing *Cooper v. Lykes* 49 So.2d 3 (La. 1950); *State ex rel. Hills, Inc. v. Recorder of Mortgages* 186 La. 661, 173 So. 139 (1937), which interpreted La. R.S. 9:5628 as allowing three years from the effective date of the law in order to pass constitutional muster.[10]

In the instant case, the effective date of the repeal of La. R.S. 9:5626 and applicability of La. R.S. 13:5111, was April 14, 1998, the date the court rendered its decision holding same to be the law.

Therefore, in extending elementary considerations of fairness to petitioners and all other riparian landowners whose property has been taken for public flood control purposes, the three year prescriptive period provided by La. R. S. 13:5111 should only commence from the date of the court's decision.

This will avoid divesting petitioners' vested rights to just compensation and provide the due process demanded by the federal constitution. *Lott v. Haley,* 370 So.2d 521 (La. 1979).

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[10] *Louisiana courts refused to apply a three year limitation retroactively so as to bar the joinder of a solidary obligor since the right to join was vested at the time suit was filed.* ***Cements v. State Dept. of Health,*** *391 So.2d 66 (La. App. 1980).* ***cert. denied*** *396 So.2d 932 (La. 1981).*

(iv) Interpretive Law Cannot Disturb Vested Property Rights

It has been argued that the court's decision is merely interpretive and therefore subject to retroactive application. But the law is well settled that even interpretive legislation cannot operate to disturb vested rights. *St. Paul Fire Marine Ins. Co. v. Smith* 609 So.2d 809, 819 (La. 1991).

The landowners' rights to just compensation became vested at the time the government took its property for public flood control purposes. This right is protected by the guarantees of the Fifth and Fourteenth Amendments.

The Legislature cannot retroactively affect, under the guise of interpretive legislation, vested rights acquired under previously valid laws. *Ibid.*

It is no less a violation of the Fifth and Fourteenth Amendments when such interpretive action is done by the courts rather than the other branches of government. *Landgraf v. USI Film Products, supra; Williamson v. Vardeman, supra*

CONCLUSION

In the end, it comes down to whether or not the silent and implied repeal of a law, after the taking, can, within constitutional limitations, operate retroactively to disturb preexisting property rights and deny payment of just compensation to landowners whose property was taken for public purposes, without providing the opportunity of backward looking relief.

It appears clear to this writer that, under the circumstances of this case, such harsh and undeserved consequences would result from the retroactive effect so as to exceed the constitutional limitations of the Fifth and Fourteenth Amendments.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 97-C-2121

APR 14 1998

WYNAT DEVELOPMENT COMPANY, AN ORDINARY LOUISIANA PARTNERSHIP, AND WYNAT DEVELOPMENT CORPORATION

v.

THE BOARD OF LEVEE COMMISSIONERS FOR THE PARISH OF ORLEANS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS

KIMBALL, Justice*

We granted this writ to determine whether the prescriptive period governing claims for compensation for property appropriated for levee purposes is the two year period found in La. R.S. 9:5626 or the three year period found in La. R.S. 13:5111. Finding La. R.S. 9:5626 was implicitly repealed, we hold the applicable prescriptive period is that provided in La. R.S. 13:5111, and plaintiffs' suit filed more than three years after the taking is prescribed.

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* JOHNSON, J., not on panel. *See* Rule IV, Part 2, Section 3.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Wynat Development Company and Wynat Development Corporation (Wynat), seek damages for land taken and actually used for levee purposes and severance damages related to the remaining property. For purposes of deciding the issue before us relative to prescription, we need only recite the following undisputed facts.

On July 20, 1983, pursuant to a request by the U.S. Corps of Engineers to furnish the necessary rights of way to construct the Algiers Point Levee Setback, Levee Enlargement and Slope Pavement Project, defendant, the Board of Levee Commissioners for the Parish of Orleans (Levee Board) adopted a resolution appropriating an eight-foot strip of Wynat's land located at Algiers Point for the purpose of building a cueing lane for vehicular traffic which was required to accommodate the levee setback. Notice of the appropriating resolution was given to Wynat by the Levee Board by letters dated July 26, 1983, and August 15, 1983. Attached to the July 26, 1983, letter was a map which designated the exact dimensions of the eight-foot strip of land. In brief, Wynat concedes it received written notice of the Levee Board's appropriating resolution on August 15, 1983.[1]

The Levee Board commenced construction of the levee in the summer of 1985, and the project was completed in December, 1985. Upon completion of the work, Wynat and the Levee Board could not agree on either the amount of compensation for the land actually used and destroyed or on the

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[1] Original Brief on Behalf of Applicants/Plaintiffs, Wynat Development Company, an Ordinary Louisiana Partnership, and Wynat Development Corporation, p. 1.

amount of severance and other consequential damages related to the remaining property. On April 16, 1987, Wynat filed this action seeking compensation for both the lands actually used and destroyed and for severance and consequential damages sustained by the remaining property as provided by La. R.S. 38:301(C)(1)(h).[2]

The Levee Board filed an exception of prescription asserting the three year prescriptive period provided for in La. R.S. 13:5111 was applicable to Wynat's claim and commenced upon notice of the appropriation which, here, was August 15, 1983. Hence, it argued, Wynat's suit filed on April 16, 1987, had prescribed. In opposition to the Levee Board's exception, plaintiffs argued the applicable prescriptive period was that provided by La. R.S. 9:5626 which by its terms applies to actions and claims for lands used or destroyed for levee purposes. This two year prescriptive period commenced from the date on which the property was actually occupied and used or destroyed for construction of levees which, in this case,

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[2] La. R.S. 38:301(C)(1)(h) provides:

> The measure of compensation for lands and improvements taken or destroyed for levee and levee drainage purposes by way of a permanent levee servitude shall be the fair market value of the property taken or destroyed before the proposed use of the property or construction of the levee facilities, without allowing any change in value caused by the construction of the levee facilities. The measure of damages, if any, to the remaining property of the owner by reason of the use or destruction of a portion of the property is determined on a basis of immediately before and immediately after the use or destruction of the property for levee drainage construction, taking into consideration the effects of the completion of the project in the manner proposed or planned.

was the date of completion of the project, December, 1985. Therefore, Wynat argued, its suit filed on April 16, 1987, was timely.[3]

The trial court sustained the Levee Board's exception of prescription and dismissed Wynat's suit, reasoning:

> The plaintiff had notice of the appropriation when a letter was delivered to them on 15 August 1983. Suit was filed on 16 April 1987, more than 3 years later.
>
> The Court concludes that R.S. 13:5111 and Section 3 of the Act creating it apparently and silently repealed R.S. 95:5626 as the defendant states in its brief.

(footnote omitted).

The fourth circuit court of appeal, with one judge dissenting, affirmed the trial court's judgment,[4] reasoning that the two year prescriptive period provided for in La. R.S. 9:5626 clearly conflicts with the more recently enacted three year prescriptive period of La. R.S. 13:5111. In view of this conflict, the court of appeal concluded La. R.S. 9:5626 was repealed by the repealing clause contained in the Act which

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[3] In brief, the Levee Board concedes Wynat's claim for compensation is not prescribed if La. R.S. 95:5626 is applicable, stating, "The case is not prescribed if Acts 1958, Ex. Sess. No. 11, § 1 (La. R.S. 95:5626) applies." Original Brief of Defendant/Respondent Orleans Levee Board, p. 2.

[4] *Wynat Development Co. v. Board of Levee Com'rs for Parish of Orleans*, 96-1983 (La. App. 4 Cir. 5/30/97), 696 So.2d 163.

enacted La. R.S. 13:5111.[5] The court went on to conclude the three year prescriptive period contained in La. R.S. 13:5111 begins to run from the date of discovery of the taking which, here, was August 15, 1983, at the latest. Thus, the court held Wynat's suit filed on April 16, 1987, had prescribed.

This court granted plaintiffs' writ application[6] to address whether the prescriptive period that governs plaintiffs' claim for compensation is that found in La. R.S. 9:5626 or La. R.S. 13:5111 and to determine whether, applying the appropriate prescriptive period, plaintiff's claim has prescribed.

CLASSIFICATION OF LEVEE BOARD'S ACTION

When property is needed for levee purposes, the levee districts of this state can either appropriate or expropriate the necessary property. As early as 1893, it was recognized riparian lands needed for levee purposes could be "taken" without formal expropriation procedures because such lands are subject to a servitude under La. C.C. art. 665,[7] In *Peart v.*

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[5] Section 3 of Acts 1975, No. 434, part of the Act which enacted La. R.S. 13:5111, specifically provided that "[a]ll laws or parts of laws in conflict herewith are hereby repealed.

[6] *Wynat Development Co. v. Board of Levee Com'rs for Parish of Orleans*, 97-2121 (La. 11/21/97), 703 So.2d 634.

[7] La. C.C. art. 665 states:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.
>
> All that relates to this kind of servitude is determined by laws or particular regulations.

Meeker, 12 So. 490 (La. 1893), this court stated:

> [W]e consider the law of Louisiana too well settled to admit of further dispute to the following effect: That under article 665 of our Civil Code riparian property on navigable rivers in this state is subject to a servitude or easement imposed by law for the public or common utility, authorizing the appropriation by the government, under proper laws, of the space required for the making and repairing of levees, roads, and other public works; that the state is charged with the administration of this public servitude; that in locating and building levees she does not expropriate the property of the citizen, but lawfully appropriates it to a use which it is subject under the title itself; that in so doing she acts not under the power of eminent domain, but in the exercise of the police power. . . .

This right of appropriation has been characterized as the right to act first and talk later. *Dickson v. Board of Com'rs of Caddo Levee Dist.*, 26 So.2d 474 (La. 1946). In the instant case, as both parties correctly contend, Wynat's land was appropriated by the Levee Board when it passed the appropriating resolution on July 20, 1983.[8] Thus, the Levee Board's resolution effected an appropriation of Wynat's property for levee purposes. *See A.K.Roy, Inc. v. Board of Com'rs for Pontchartrain Levee Dist.*, 111 So.2d 765 (La. 1959); *Board*

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[8] Both lower courts characterized Wynat's suit for compensation as an inverse condemnation action. For purposes of determining whether Wynat's suit is prescribed, however, we need only classify the levee Board's action as an appropriation for levee purposes.

of Com'rs for Pontchartrain Levee Dist. v. Baron, 109 So.2d 441 (La. 1959); *Pillow v. Board of Com'rs for Fifth Louisiana Levee Dist.*, 425 So.2d 1267 (La. App. 2 Cir. 1982); *Burdin v. Board of Com'rs for Atchafalaya Basin Levee Dist.*, 533 So.2d 977 (La. App. 3 Cir. 1988); *Taylor v. Board of Levee Com'rs of Tensas Basin Levee Dist.*, 332 So.2d 495 (La. App. 3 Cir. 1976); and *Danziger v. United States*, 93 F.Supp. 70 (E.D. La. 1950).

It is only when the levee district cannot appropriate or amicably acquire property needed for levee purposes that it need formally expropriate such property. La. R.S. 38:351.[9] In the instant case the Levee Board clearly did not initiate formal expropriation proceedings pursuant to La. R.S. 38:351 *et seq.*

APPLICABILITY OF LA. R.S. 9:5626

Louisiana R.S. 9:5626, which Wynat argues provides the prescriptive period applicable to its claim for compensa-

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[9] L. R.S. 38:351 states:

> Notwithstanding any other law to the contrary, and in addition to the methods and procedures for acquisition or utilization of servitudes for levee and related purposes by levee districts and levee and drainage districts, whenever any levee district or levee and drainage district cannot appropriate or amicably acquire immovable property needed for levee purposes, including but not limited to flooding and hurricane protection purposes, the levee district or levee and drainage district may acquire the property by expropriation prior to judgment in accordance with the provisions of this Part. The method of expropriation provided by this Part shall be authorized for corporeal property and servitudes and for both riparian and nonriparian property.

tion for land actually used for levee purposes, states:

> **§5626. Action and claims for lands and improvements used or destroyed for levees or levee drainage purposes**
>
> When lands are appropriated for levees or levee drainage purposes all claims and actions for payment under Article XVI, Section 6 of the Constitution of 1921 for lands and improvements thereon actually used or destroyed for levees or levee drainage purposes shall prescribe within two years from the date on which the property was actually occupied and used or destroyed for construction of levees or levee drainage works, or, in the case of lands and improvements heretofore so occupied and used or destroyed, such prescription shall accrue two years from November 17, 1958. This prescription shall run against interdicts, married women, absentees, minors, and all others now excepted by law.

This statute purports to apply to all claims for payment under art. 16, § 6 of the 1921 Constitution. As amended by Acts 1928, No. 165, adopted November 6, 1928, that constitutional provision stated in pertinent part:

> Section 6. Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes. . . . shall be paid for at a price not to exceed the assessed value of the preceding year; provided, that this shall not apply to batture, nor to property the control of which is vested in the State or any subdivision thereof for the purpose of commerce . . . .

In the Constitution of 1974, this 1921 constitutional provision appears, as suggested by plaintiffs, to have been continued as a statute by La. Const. art. 14, § 16(A)(12). Section 16(A)(12) provides:

> Section 16. (A) Provisions Continued as Statutes. Subject to change by law *or as otherwise provided in this constitution*, and except as any of them conflicts with this constitution, the following provisions of the Constitution of 1921 are continued as statutes, but restricted to the same effect as on the effective date of this constitution:
>
> . . .
>
> (12) Article XVI, Sections 1, 4, 6, 7, 8 and 8(a).

(Emphasis added.) This continuation as a statute, however, does not control because La. Const. art. 14, § 32 deals more specifically with the continuation of La. Const. of 1921, art. 16, § 6 and is therefore "as otherwise provided in this constitution" under La. Const. art. 14, § 16(A). That specific provision, La. Const. art. 14, § 32, states:

> Section 32. The provisions of Article XVI, Section 6 of the Constitution of 1921 shall be continued as a statute, subject to change by the legislature, and the amount of compensation therein required to be paid for property used or destroyed for levee or levee drainage purposes shall be paid as provided in Section 6 of Article XVI of the Constitution of 1921 *until the legislature enacts a law to effectuate Article VI. Section 42 of this constitution.*

(Emphasis added.)

Thus, art. 16, § 6 of the 1921 constitution was to be continued as a statute only until the legaislature enacted a law to effectuate art. 6, § 42 of the 1974 constitution. La. const. art. 6, § 42 provides:

> Section 42. (A) Compensation. Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law. However, nothing contained in this Paragraph with respect to compensation for lands and improvement shall apply to batture or to property the control of which is vested in the state or any polictical subdivision for the purpose of commerce. If the district has no other funds or resources from which the payment can be made, it shall levy on all taxable property within the district a tax sufficient to pay for property used or destroyed to be used solely in the district where collected.
>
> (B) Appropriation. Nothing in this Section shall prevent the appropriation of such property before payment.

This interpretation is supported by the placement in the 1974 constitution of those provisions that continued the 1921 constitutional provisions and the explanation of them given in the constitutional debates. Both provisions which continued the 1921 constitutional provision as a statute are located in that article of the 1974 Constitution entitled, "Transitional

Provisions." Explaining what is now La. Const. Art. 14, § 32, which continued the 1921 provision until the legislature acted to effectuate the new art. 6, § 42, Delegate Lanier stated:

> Mr. Chairman and fellow delegates, if you refer to Section 43 as adopted by local government, you will see that we made a major change in the law with reference to the compensation paid for the exercise of the riparian servitude. The present law is that you're paid the asssessed value for the last preceding year. What we have done is provided that in the future, after the effective date of this constitution, that the legislature shall have the right to determine what compensation should be paid. Because of the fact that the present provisions for compensation are constitutional rather than statutory, the Committee on Local and Parochial Government felt that a special transitional schedule provision was necessary to insure and make certain that we did not have an hiatus in our law during the period of time between the effective date of the new constitution and such time as the legislature in its wisdom may act in fixing the amount of compensation. So we provided this provision that says that the present law as stated in the 1921 Constitution, that is, that the landowner would be paid the assessed evalution for the last preceding year, will remain in effect until such time as the legislature acts. Now, if we did not have such a provision, it is the feeling of the Committee of Local and Parochial Government that an argument could be made that since the constitution provides that the compensation will be as provided by the

> legislature, and that since here in this convention we are physically lifting the provisions of Article XVI, Section 6 out and transporting them to the statutes, that this is not in fact a legislature fixing the compensation and therfore, such a provision would not be valid without a special schedule provision showing our intention to do this. This is the reason to do this so that no one will be unnecessarily hurt during the transitional period between such time as the constitution goes into effect and the legislature acts. Now, if there is a special session of the legislature that does enact such a law prior to the time that we had the effective date, then, of course, that law will take effect on the effective date, and there would be no necessity for such a transitional provision as this. But, in the absence of such action if we do not provide this, it is the feeling of many of us that we will have an hiatus in the law, and persons whose property is exercised by the riparian servitude, if the servitude is used on their property, may be in a position where they cannot get anything for the use of their land; and this is a situation we thought should be avoided.

Records of the Louisiana Constitutional Convention of 1973; Convention Transcripts, Vol. 9, 121st Days Proceedings, p. 3470 (January 18, 1974).

Obviously, then, art. 16, § 6 of the 1921 constitution continues to be a valid statutory provision only if the legislature has not acted to effectuate art. 6, § 42 of the 1974

constitution. If the legislature has not yet enacted any statute providing for compensation for lands and improvements actually used or destroyed for levees or levee drainage purposes, then La. Const. of 1921, art. 16, § 6 is still valid legislation to determine the amount of such compensation. If, however, the legislature has enacted such a provision, then art. 16, § 6 of the 1921 constitution is no longer a viable statute upon which plaintiffs can rely. Concomitantly, La. R.S. 9:5626, providing a prescriptive period for the cause of action provided by art. 16, § 6 of the 1921 constitution, is rendered meaningless and implicitly repealed.

In Act 314 of 1978, the legislature did in fact enact a statute to effectuate La. Const. art. 6, § 42. The stated purpose of that Act was:

> [t]o amend and reenact Section 281 of Title 38 of the Louisiana Revised Statutes of 1950, relative to levees and levee drainage, *to provide for measure of compensation for land and improvements, Orleans Parish excepted, actually used, damaged or destroyed for levees or levee drainage purposes,* and otherwise to provide with respect thereto.

(Emphasis added.) This statute, effective July 10, 1978, provided for the first time since the adoption of the 1974 constitution a rate of compensation to be paid for lands and improvements actually used, damaged or destroyed for levees or levee drainage purposes different from the old assessed value method found in La. Const. of 1921 art. 16 § 6. Although the first version of this statute excepted Orleans Parish from the new "fair market value" scheme of compensation for land and improvements actually used, damaged or destroyed for

levees or levee drainage purposes, the legislature removed this exception from La. R.S. 38:281 the following year in Act 676 of 1979, effective July, 18, 1979, which described Act 314 of 1978 as containing "vague and indefinite" provisions particularly with respect to lands used or destroyed for levees and levee drainage purposes for which fair market value must be paid. The intent to continue La. const. of 1921, art. 16, § 6 as only a transitional provision until the legislature enacted a new measure of compensation, combined with the repealing provision in Act 676 of 1979, which stated that "[a]ll laws or parts of laws in conflict herewith are hereby repealed," show Act 676 of 1979 effectively repealed art. 16, § 6 of the 1921 constitution in its entirety. The new statute instructed all Louisiana parishes to pay for lands and improvements actually used, damaged, or destroyed for levees and levee drainage purposes at fair market value to the full extent of the loss and directly conflicted with the former "assessed value" measure of compensation utilized by the 1921 constitution. *See Givens v. Fifth Dist. Levee Board*, 445 So. 2d 781 (La. App. 3 Cir. 1984). *See also* Historical and Statutory Notes, Constitution Ancillaries, Const. 1921, Art. 16, sec. 6 (Wests 1996) (Pursuant to the statutory revision authority of the Louisiana State Law Institute, La. Const. of 1921, art. 16, § 6, is no longer set forth as live text and is noted to be "Repealed by implication.").

Louisiana R.S. 9:5626, the prescriptive statute Wynat claims governs its suit for compensation, was enacted into law by Act 11 of an extra session of the 1958 legislature. Louisiana R.S. 9:5626 explicitly refers to "all claims and actions for payment under Article XVI, Section 6 of the Constitution of 1921." As such, it was enacted to clarify the law as to when an action arising under La. Const. of 1921, art. 16,

§ 6 prescribed. *A.K. Roy, Inc. v. Board of Com'rs for Pontchartrain Levee Dist.*, 111 So.2d 765 (La. 1959). As discussed above, however, the cause of action for payment of the assessed value of property appropriated for levees or levee drainage purposes has been repealed by the legislature's enactment of a cause of action for payment of the fair market value to the full extent of the loss when lands are actually taken, used, damaged or destroyed for levee or levee drainage purposes. Wynat has, in fact, asserted a cause of action under this new compensation scheme found in La. R.S. 38:301; not one under art. 16, § 6 of the 1921 constitution. Therefore, by its own terms, La. R.S. 9:5626 does not apply to Wynat's claim. Moreover, La. R.S. 9:5626 will never apply to claims for compensation for lands appropriated for levees or levee drainage purposes because the legislature repealed the cause of action for all claims and actions for payment under La. Const. of 1921, art. 16, §6 upon which the prescriptive period in La. R.S. 9:5626 was based.Without a cause of action to which it might apply, this prescriptive period is meaningless. Hence, in light of the unique purpose fulfilled by La. R.S. 9:5626 relative to claims under La. Const. of 1921, art. 16, § 6, and the fact art. 16, § 6 of the 1921 constitution is no longer needed as a transitional statute and was repealed by the legislature, we hereby conclude La. R.S. 9:5626, which provides the prescriptive period specifically applicable to claims under this provision, has also been repealed by implication and cannot be applied to this case.

APPLICABILITY OF LA. R.S. 13:5111

Pursuant to a comprehensive reenactment in 1985, the substance of La. R.S. 38:281, which provided authority for levee districts to appropriate land needed for levee purposes

and for compensation at the fair market value of such land, was included in La. R.S. 38:301 by Act 785 of 1985. It is La. R.S. 38:301 that today gives the Levee Board the authority to appropriate Wynat's land by resolution. La. R.S. 38:301, however, contains no prescriptive period governing claims for compensation for property appropriated by resolution for levee purposes. The Levee Board points to La. R.S. 13:5111 as the governing prescriptive period. That statute provides:

> **§5111. Appropriation of property by state, parish, municipality or agencies thereof; attorney, engineering and appraisal fees; prescription**
>
> A. A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, *other than through an expropriation proceeding,* shall determine and award to the plaintiff, as part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding. Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding. *Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.*

> B. The rights of the landowner herein fixed are in addition to any other rights he may have under the constitution of Louisiana and existing statutes, and nothing in this Part shall impair any constitutional or statutory rights belonging to any person on September 121, 1975.
>
> (Emphasis added.)

This statute clearly purports to apply to a suit brought for compensation for the taking of property by the state, a parish, municipality or other political subdivision other than through an expropriation proceeding. Louisiana R.S. 13:5102(B) defines a political subdivision as any parish, municipality, special district, school board, sheriff, public board, institution, department, commission, district, corporation, agency, authority, or an agency or subdivision of any of these, and other public or governmental body of any kind which is not a state agency. As a "special district" of the state, the Orleans Levee District is a political subdivision under this definition. *See also* La. R.S. 38:281(6) defining "Levee district" as "a political subdivision of this state organized for the purpose and charged with the duty of constructing and maintaining levees, drainage, and all other things incidental thereto within its territorial limits." Moreover, as discussed previously, a taking of riparian property through the adoption of a resolution by a levee board is an appropriation, not an expropriation. Hence, the statute, by its own terms, clearly applies to the appropriation of Wynat's property by the Levee Board.

Having determined La. R.S. 13:5111 applies by its own terms to an appropriation by resolution for levee purposes, we may make no further inquiries into the legislative intent

behind the statute unless its application leads to absurd consequences. La. C.C. art. 9 ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."). Wynat argues the application of La. R.S. 13:5111 to this case leads to absurd consequences when read together with La. R.S. 38:301, the statute that gives the Levee Board the authority to appropriate Wynat's land for levee purposes. Specifically, Wynat contends the commencement of prescription upon notice of the appropriating resolution creates an irreconcilable conflict with La. R.S. 38:301(C)(2)(a) because that statute provides, "[t]he compensation due under the provisions of this Subsection shall be paid to the owner within one year after the actual taking, use, damage, or destruction of the property in accordance with the provisions of this Section." Wynat's argument is that if it files within the three year period provided by La. R.S. 13:5111, but prior to one year after the actual taking, use, damage, or destruction of its property as specified in La. R.S. 38:301(C)(2)(a), it will be met with an exception of prematurity. We find this argument to be without merit.

Under the terms of La. R.S. 13:5111, Wynat's claim for compensation prescribes three years from the date of the taking. The lower courts determined, and the parties agree, the taking, as that term is used in La. R.S. 13:5111, is the date Wynat received notice of the passage of the appropriating resolution. For purposes of this case, we need not evaluate the correctness of those determinations and may assume prescription commenced on this date because Wynat's claim is prescribed regardless of whether the applicable date is the date of the passage of the appropriating resolution or the date

Wynat received notice of the resolution. Wynat concedes it had notice of the adoption of the resolution on August 15, 1983. Therefore, prescription commenced on August 15, 1983, at the latest.

Under the terms of La. R.S. 13:5111, Wynat had three years from the date of the taking of its land to file its suit for compensation. Although the taking authority has an obligation to compensate the landowner from the date of the taking, i.e., here, the date Wynat had notice of the passage of the appropriating resolution, which obligation the landowner must seek to enforce within the prescriptive period provided by La. R.S. 13:5111, La. R.S. 38:301(C((2)(a) merely gives the Levee Board a term for payment. Thus Wynat could validly file suit on the day its property was taken, and a judgment could be rendered which would: (1) set the amount of compensation due pursuant to La. R.S. 38:301(C)(1)(b), which allows severance damages to be computed "taking into consideration the effects of the completion of the project in the manner proposed or planned," and would (2) set the time for payment under La. R.S. 38:301(C)(2)(a). If the Levee Board does not pay after the one year period in La. R.S. 38:301(C)(2)(a) has accrued, then the landowner would be entitled to execute on the judgment subject to the provisions in La. R.S. 38:301(C)(2)(e).[10] When La. R.S. 38:301(C)(2)(a) and La. R.S. 13:5111 are read *in pari materiae*, it becomes clear that filing a suit for compensation under these cir-

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[10] La. R.S. 38:301(C)(2)(e) provides:

> The owner shall be compensated as provided in this Section only when and if, in its discretion, the legislature, the levee board, or the federal government, appropriates the funds therefor.

cumstances is not premature within the meaning of La. C.C.P. art. 423.[11] The right to enforce some obligations does not accrue until the occurrence of a term for performance or suspensive condition. In these cases, under Article 423, an action brought to enforce this type of obligation, seeking, for example, damages, shall be dismissed as premature if it is brought prior to the right to enforce it has accrued. In other words, the obligee cannot even file suit until the occurrence of the term or suspensive condition. In the instant situation, however, the legislature enacted La. R.S. 13:5111 which specifically allows, and indeed requires, a landowner to file his suit seeking to enforce the taking authority's obligation to compensate him under La. R.S. 38:301(C)(1)(a) within three years from the passage of the appropriating resolution. Thus, the landowner's right to enforce the obligation , *i.e.*, to file a suit to determine damages owed, and to obtain a judgment awarding damages, accrues with the passage of the resolution and not with the occurrence of any term or suspensive condition. Understood in this manner, the application of the prescriptive period in La. R.S. 13:5111 does not lead to

---

[11] La. C.C.P. art. 423 discusses prematurity as follows:

> An obligation implies a right to enforce it which may or may not accrue immediately upon the creation of the obligation. When the obligation allows a term for its performance, the right to enforce it does not accrue until the term has elapsed. If the obligation depends upon a suspensive condition, the right to enforce it does not accrue until the occurrence or performance of the condition.
>
> When an action is brought on an obligation before the right to enforce it has accrued, the action shall be dismissed as premature, but it may be brought again after the right has accrued.

absurd consequences when read together with La. R.S. 38:301.[12]

Because the terms of La. R.S. 13:5111 are clear and unambiguous and their application to cases such as the one presented here leads to no absurd consequences, we conclude La. R.S. 13:5111 applies to claims for compensation for land appropriated by resolution for levee purposes. The prescriptive period for Wynat's claim for compensation commenced upon the taking of its property by the Levee Board, which, here, is assumed to be August, 15, 1983, the date Wynat received notice of the passage of the appropriating resolution. Wynat's claim for compensation for land appropriated by the levee Board prescribed three years from this date pursuant to La. R.S. 13:5111. Accordingly, its suit filed on April 16, 1987, was prescribed and we therefore affirm the lower courts' decisions sustaining defendant's exception of prescription.

AFFIRMED.

---

[12] Wynat argues the doctrine of contra non valentem agere nulla currit praescriptio applies to suspend running of prescription under La. R.S. 13:5111 because it was legally barred from enforcing its right to compensation until one year after completion of the project because that is when its damages could be ascertained and the Levee Board would be forced to pay the compensation due them under La. R.S. 38:301(C)(1)(a). As discussed above, Wynat was not barred from bringing its suit and reducing its claim to a judgment at any time after the adoption of the appropriating resolution. Contra non valentem, therefore, is not available to Wynat to suspend the running of prescription in this case.

SUPREME COURT OF LOUISIANA

No. 97-C-2121

WYNAT DEVELOPMENT COMPANY,
AN ORDINARY LOUISIANA PARTNERSHIP,
AND WYNAT DEVELOPMENT CORPORATION

Versus

THE BOARD OF LEVEE COMMISSIONERS
FOR THE PARISH OF ORLEANS

Apr 14 1998

LEMMON, J., Dissenting

Prior to 1974, the cause of action for appropriation was provided by La. Const. (1921) art. XVI, §6, which required payment of compensation when property has been appropriated for levee purposes and set the standard for determining such compensation "at a price not to exceed the assessed value of the preceding year." In 1958, the Legislature enacted La. Rev. Stat. 9:5626 to provide a special two-year prescriptive period governing such an action for compensation under La. const. art. XVI, §6, commencing on the date the property was actually occupied and used.

The majority concludes the 1974 Constitution and subsequent legislation abolished the cause of action for payment of property appropriated for levee purposes created by former La. Const. art. XVI, §6 and established a new cause of action with a different prescriptive period, I disagree.

What actually occurred in 1974 is that the framers of the new constitution continued in effect the constitutional cause of action for payment, but delegated to the Legislature the authority to set the standard for determining such compensation.

Three provisions of the 1974 constitution are pertinent:

1. La. Const art. XIV, §16(A)(12), a general provision that continued as a statute all the provisions of La. Const. (1921) art. XVI, §6.

2. La. Const. art XIV, §32, a specific provision that also (a) continued the provisions of the La. Const. (1921) art. XVI, §6 as a statute "subject to change by the legislature" and (b) further continued the standard in the 1921 Constitution for determining the amount of compensation "until the legislature enacts a law to effectuate Article VI, Section 42 of this constitution."

3. La. Const. art. VI, §42, a provision that compensation "shall be paid for as provided by law," thereby authorizing the Legislature to fix the standard for determining compensation.

The latter two provisions recognized the authority of the Legislature to fix the standard for determining compensation for appropriation of property used for levee purposes and further maintained the existing standard until the Legislature acted. The framers thus provided that during the interim between the effective date of the 1974 Constitution and the time the Legislature enacted such a statute fixing the new standard for determining the "amount of compensation," the standard set forth in the 1921 Constitution

would apply. The Legislature enacted such a statute, La. Rev. Stat. 38:281, in 1978 and in 1979.

In my view, the time limitation in La. Const. art. XIV, §32 was intended only to apply to the standard for determining the "amount of compensation," which the framers authorized the Legislature to fix by subsequent act. In so doing, the framers did not a set a time limit on the vitality of the cause of action for compensation under the 1921 Constitution which had been continued as statute. Even after the Legislature acted to fix the standard for determining the amount of compensation, the cause of action under La. Const. (1921) art. XVI, §6 (and continued as a statute) remained viable and subject to the prescriptive period especially enacted for that cause of action.

The framers of the 1974 Constitution and the redactors of the subsequent revised statute did not expressly repeal the cause of action established by La. Const. (1921) art. XVI, §6 and continued as a statute by La. Const. art. XIV, §16(A)(12). Moreover, implied repeal is highly disfavored. In my view, the majority erred in holding that the specific prescriptive period, which was designed to cover the issue presented here, no longer applies because the underlying cause of action was implicitly repealed in 1974 by La. Const. art. VI, §32, effective upon the enactment of La. Rev. Stat. 38:281 in 1978 and in 1979.

APPENDIX B

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

Pascal F. Calogero, Jr.
CHIEF JUSTICE — 301 Loyola Ave. 70112
JOHN TARLTON OLIVER — TELEPHONE 504-568-5707
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Re: Wynat Development Co.
vs. Board of Levee Comm.
No. 97-C-2121

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled

referenced case.

This judgment is now final. By copy of this letter we are advising both the trial court and appellate court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,

/s/ John Tarlton Oliver

John Tarlton Oliver
Clerk of Court

JTO:cag
ENCLOSURE
ccs: Hon. Max N. Tobias
Hon. Dale Atkins
Hon. Danielle Schott

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 059

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *26th day of June, 1998*, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARINGS DENIED:

97-C - 0956 EDWARD MORGN v. ABC MANUFACTURER, DEF INSURANCE COMPANY GHI PARTS SUPPLIERS, ET AL (Parish of Jefferson)
MARCUS, J. - would grant a rehearing.
JOHNSON, J. - not on panel.
VICTORY, J. - would grant rehearing.
TRAYLOR, J. - would grant a rehearing.

97-C - 2121 WYNAT DEVELOPMENT COMPANY, AN ORDINARY LOUISIANA PARTNERSHIP, AND WYNAT DEVELOPMENT CORPORATION v. THE BOARD OF LEVEE COMMISSIONERS FOR THE PARISH OF ORLEANS (Parish of Orleans)
CALOGERO, C.J. - would grant a rehearing.
MARCUS, J. - would grant a rehearing.
LEMMON, J. - would grant a rehearing.
JOHNSON, J. - not on panel.

APPENDIX C

PUBLIC CONTRACTS, WORKS AND IMPROVEMENTS

La. R.S. 38 § 301. Construction and maintenance of levees and drainage; care and inspection of levees; measure of compensation; right of entry

A. The levee boards and levee and drainage boards of this state may construct and maintain levees, drainage, and levee drainage, and do all other things incidental thereto. The levee boards and levee and drainage boards may do all drainage work incidental to or made necessary by the construction of the levee system in this or adjoining states. However, any construction project undertaken shall be in accordance with the provisions of R.S. 38:2211, et seq.

B. The care and inspection of levees shall devolve on resident commissioners, assisted by such inspectors and watchmen as may be appointed pursuant to regulations which the boards are hereby authorized to adopt. Each resident commissioner and any inspector or watchman who may be appointed shall attend once during his term of office an educational training program conducted by the office of public works or its successor.

C. (1)(a) All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

(b) The owner shall be given written notice of the appropriating resolution by the levee board within ten days of the date of its passage.

(c) Payment by the federal, state, or local government under existing or prior law, for the loss of lands or improvements used, damaged, or destroyed for levee or levee drainage purposes shall constitute payment in full for the exercise of a permanent levee servitude as provided by law over the lands and improvements when taken, used, damaged, or destroyed. No additional payment shall be due the owner for future work performed on, or the future taking, use, damage, or destruction of, the same lands or improvements over which the permanent servitude is taken and for which any compensation has been paid, for levee or levee drainage purposes.

(d) The term "same lands or improvements" shall include, but not be limited to, the levee servitude right of way, borrow areas, and areas determined to have been depreciated in value from the former use, drainage, or destruction for levee or levee drainage purposes.

(e) Notwithstanding any other provision to the contrary, the various levee districts shall also have the authority to appropriate lands and improvements for temporary servitudes for levee construction purposes. As to these temporary servitudes, the "fair market value" shall mean the use value of the lands actually used for the period of time utilized by the appropriating agency.

(f) It shall be the duty of the appropriating agency to specify and delineate at the time of the appropriating resolution, whether areas taken shall be burdened with a perm-

anent levee servitude or a temporary servitude for levee construction purposes.

(g) "Use" shall be deemed to occur at the time the levee board formally adopts its resolution specifically describing an area to be utilized for levees and levee drainage purposes through the exercise or acquisition of a permanent levee servitude or a temporary servitude provided that actual use of the property commences within two years of the adoption of the resolution. Notice by certified mail shall be given to the owner within five days of the adoption of the resolution.

(h) The measure of compensation for lands and improvements taken or destroyed for levee and levee drainage purposes by way of a permanent levee servitude shall be the fair market value of the property taken or destroyed before the proposed use of the property or construction of the levee facilities, without allowing any change in value caused by the construction of the levee facilities. The measure of damages, if any, to the remaining property of the owner by reason of the use or destruction of a portion of the property is determined on a basis of immediately before and immediately after the use or destruction of the property for levee drainage construction, taking into consideration the effects of the completion of the project in the manner proposed or planned.

(i) The compensation for a permanent levee servitude defined herein shall apply to all lands, exclusive of batture, and improvements appropriated, taken, used, damaged, or destroyed for levee purposes after the effective date of this Act.

(j) Nothing contained in this Subsection shall apply to batture or to property the control of which is vested in the state or any political subdivision for the purpose of commerce.

(2)(a) The compensation due under the provisions of this Subsection shall be paid to the owner within one year after the actual taking, use, damage, or destruction of the property in accordance with the provisions of this Section.

(b) Immediately after the actual taking, use, damage, or destruction of the property, the levee board shall make an estimate of the compensation due under the provisions of this Section, and shall make an estimate of the revenues available to the levee board from all sources from which to make the payment of the compensation; however, the estimate of revenues shall not take into account any taxes levied after the time of the actual taking, use, damage or destruction of the property, except such taxes as may be levied pursuant to authorization and approval by the voters in the district. If revenues available to the levee board are sufficient to pay the compensation due to the owner, the levee board shall pay the owner within one year of the actual taking, use, damage, or destruction of the property.

(c) The amount of compensation due to the owner shall be paid from funds appropriated by the legislature by the office of public works of the Department of Transportation and Development. The levee board shall immediately notify the office of public works of the estimate of the amount of compensation due to the owner, the amount of revenues available to the board, and the amount of insufficient revenues. Upon such notification, the office of public works shall make its own estimate of the monies available to the levee board, and

the amount of compensation to the owner. If the estimates of the levee board and the office of public works differ, the estimates of the office of public works shall be controlling.

(d) As used in this Paragraph, the term "levee board" shall not apply to the governing authority of a levee district which has been merged or consolidated into a local government pursuant to the provisions of Article VI, Section 16 of the Constitution of Louisiana.

(e) The owner shall be compensated as provided in this Section only when and if, in its discretion, the legislature, the levee board, or the federal government, appropriates the funds therefor.

(f) Reasonable attorneys' fees may be awarded by the court if the amount found to be due by the state, the levee board, or the federal government is less than the amount of compensation awarded in any judgment seeking additional compensation. The attorneys' fees shall not exceed twenty-five percent of the difference between the award and the amount found to be due by the state, the levee board, or the federal government.

D. Levee boards and levee and drainage boards and their authorized agents and employees shall also have the power to enter upon any lands, waters, and premises in the state for the purpose of making such surveys, soundings, drillings, and examinations as they may deem necessary or convenient for carrying out the purposes of this Chapter, which entry shall not be deemed a civil or criminal trespass nor a temporary construction servitude, nor shall it be deemed an entry under any eminent domain proceedings which may

be then pending, provided that prior written notice of five days to resident owners and fifteen days to nonresident owners be given to the last record property owner as reflected in the parish assessmet rolls. Written notice shall consist in mailing the notice by certified mail to the last known address of the owner as shown in the current assessment records. The levee boards and/or levee and drainage board shall indemnify the property owner for any loss of injury resultant from entry upon the property and shall make reimbursement for any actual damages resulting to lands, waters, and premises as a result of these activities.

Acts 1985, No. 785, § 1, eff. July 22, 1985. Amended by Acts 1992, No. 182, § 1, eff. June 8, 1992.

APPENDIX D

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES
TITLE 38. PUBLIC CONTRACTS, WORKS AND IMPROVEMENTS
CHAPTER 4. LEVEE DISTRICTS
PART III. GENERAL PROVISIONS

§301. Construction and maintenance of levees and drainage; care and inspection of levees; measure of compensation; right of entry

CROSS REFERENCES

Authority of levee districts to appropriate property not affected by provisions authorizing expropriation, see R.S. 38:396.

"Batture", definition, see R.S. 38:281.

Compensation for property used or destroyed for levee purposes, see Const. 1921 (Ancillaries), Art. 16, § 6.

Expropriation by declaration of taking, Generally, see R.S. 38:351 et seq.
Compensation for expropriated property, see R.S. 38:387.

"Fair market value", definition, see R.S. 38:281.

"Full extent of the loss", definition, see R..S. 38:281.

Legal public servitudes for levees, see C.C. art. 665.

Oil, gas or water pipelines, notification of owners before construction or removal of levees, see R.S. 38:312.

Prescription, actions and claims for lands and improvements used or destroyed for levees or levee drainage purposes, see R.S. 9:5626.

Timber on levee board lands, sale, see R.S. 41:1041 et seq.

Wharves, buildings and improvements, uncompensated appropriation from riparian landowners, see R.S. 9:1102.1.

APPENDIX E

Art. XVI, § 6. Compensation for property used or destroyed; tax

Section 6. Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value of the preceding year; provided, that this shall not apply to batture, nor to property the control of which is vested in the State or any subdivision thereof for the purpose of commerce; and provided, further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed.

If the district has no other funds or resources out of which such payment can be made, it may levy, on all taxable property situated therein, a tax sufficient to pay for said property so taken, and for such streets and highways so relocated and restored, within the limits of any municipality of one hundred thousand population or over not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment. (As amended Acts 1928, No. 165, adopted Nov. 6 1928.)

(2)

Supreme Court, U.S.
FILED
OCT 26 1998
OFFICE OF THE CLERK

No. 98-501

In The

Supreme Court of the United States

October Term, 1998

WYNAT DEVELOPMENT COMPANY,
An Ordinary Louisiana Partnership,
and WYNAT DEVELOPMENT CORPORATION,

Petitioners,

vs.

THE BOARD OF COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Louisiana violated petitioners' Fourteenth Amendment due process rights by binding them to an opinion that construed the language of a mature statute for the first time?

2. Whether the United States Constitution obliges a state to compensate a property owner who failed to institute a timely action for compensation?

3. Whether a property owner must be given prior notice of the detrimental impact of a statute that had not been previously construed by a state supreme court before that statute may affect the property owner's rights?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Introduction	1
B. Facts	9
C. Proceedings Below	10
D. The Nature of the Legal Controversy	10
Reasons for Denying the Writ	15
I. The Outcome In This Case Represents Neither An Unconstitutional Taking Of Private Property Without Just Compensation Nor A Taking In Violation Of The Due Process Rights Of The Petitioners.	15
II. A Court Decision Announcing The Effect Of A Statute Enacted Years Before A Property Owner's Remedy Became Vested Is Not Made Impermissibly Retroactive By Its Prejudicial Impact On The Landowner's Rights.	21
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

A.K. Roy, Inc. v. Board of Commissioners, 237 La. 541, 111 So. 2d 765 (1959) 24

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 4

Chamberlain v. State Through Dept. of Transp. and Development, 624 So. 2d 874 (La. 1993) 23

Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) 2, 17

Danziger v. United States, 93 F. Supp. 70 (E.D. La. 1950) 12

DeSambourg v. Board of Com'rs, 621 So. 2d 602 (La. 1993) 2, 3, 4, 8, 16

Eastern Extension, Australasia & China Telegraph Company v. United States, 231 U.S. 326, 34 S. Ct. 57, 58 L. Ed. 250 (1913) 14, 22

Eldridge v. Trezevant, 160 U.S. 452, 16 S. Ct. 345, 40 L. Ed. 490 (1896) 2, 3, 7, 16

General Box Company v. United States, 351 U.S. 159, 76 S. Ct. 728 (1956) 3

Table of Cited Authorities

Page

Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529 (1965) 23, 24

Hawthorne v. La. Dept. of Public Works, 540 So. 2d 1261 (La. App. 3rd Cir. 1989) 2

Holden v. State of Minnesota, 137 U.S. 483, 11 S. Ct. 143, 34 L. Ed. 734 (1890) 1

Macon v. Costa, 437 So. 2d 806 (La. 1983) 14

Morgan v. Livingston, 6 Martin's Reports (O.S.) 19, 2 La. 9 (1819) 7

North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1925) 12

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Pruyn v. Nelson Bros., 180 La. 760, 157 So. 585 (1934) 3, 7

Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) 8

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Saint Francis College v. Al-Khazraji, 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d (1987) 18

Table of Cited Authorities

	Page
Simpson v. Union Oil Co. of California, 396 U.S. 13, 90 S. Ct. 30, 24 L. Ed. 2d 13 (1969)	18, 19
Solem v. Stumes, 465 U.S. 638, 104 S. Ct. 1338, 79 L. Ed. 2d 579 (1984)	18
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Terrebonne v. South Lafourche Tidal Control, 445 So. 2d 1221 (La. 1984)	16
Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982)	2, 4, 8, 12, 15, 19, 20, 21, 25, 26
Tugwell v. State Farm Ins. Co., 609 So. 2d 195 (La. 1992)	25
United States v. Estate of Donnelly, 397 U.S. 286, 90 S. Ct. 1033, 25 L. Ed. 2d 312 (1970)	18, 25
United States v. Locke, 471 U.S. 84, 105 S. Ct. 1799, 85 L. Ed. 2d 64 (1985)	9, 15, 26
West Jefferson Levee Dist. v. Coast Const. Co., 640 So. 2d 1258 (La. 1993)	15
Wynat Development Company v. Board of Levee Com'rs, 97-2121 (La. 4/14/98), 710 So. 2d 783	*passim*
Wynat Development Company v. Board of Levee Com'rs for Parish of Orleans, 96-1983 (La. App. 4th Cir. 5/30/97), 696 So. 2d 163	10

Table of Cited Authorities

Page

Statutes:

Article 8 of the Louisiana Civil Code of 1808 ..... 4, 5

C.C. art. 455 5

C.C. art. 456 5

C.C. art. 478 6

C.C. art. 488 5

C.C. art. 490 5

C.C. art. 646 6

C.C. art. 651 6

C.C. art. 654 6

C.C. art. 661 7

C.C. art. 665 ..... 6, 7

LSA-R.S. 9:5626 ..... *passim*

LSA-R.S. 13:5101 ..... 16, 22, 24

LSA-R.S. 13:5102(B) 24

LSA-R.S. 13:5111 ..... *passim*

Table of Cited Authorities

	Page
LSA-R.S. 13:5111(A)	11, 16, 23
LSA-R.S. 38:281	19
LSA-R.S. 38:291(K)(1)	4
LSA-R.S. 38:301	3, 19, 25
LSA-R.S. 38:301(A)	4
LSA-R.S. 38:301(C)(1)(b)	19
33 U.S.C. § 701, *et seq.*	3
United States Constitution:	
Fifth Amendment	1
Fourteenth Amendment	i, 1
Other Authorities:	
La. Const. of 1921, art. 3, § 35	24
La. Const. of 1921, art. 16, § 6	13, 14, 16, 24, 25
La. Const. of 1974, art. 12, § 10(C)	16, 22

Table of Cited Authorities

Page

Legislative Acts:

Acts 1958, Ex. Sess. No. 11, § 1 13

Acts 1975, No. 434 ..... 11, 16, 22, 23

Acts 1978, No. 314 ..... 16, 19, 25

Acts 1979, No. 676 ..... 16, 19

APPENDIX

Appendix A — Acts 1975, No. 434; LSA-R.S. 13:5101 (West 1991) (Historical And Statutory Notes; LSA-R.S. 13:5111 (West 1991) (Historical And Statutory Notes) 1a

STATEMENT OF THE CASE

A. Introduction

This property dispute touching property appropriated for levee purposes comes here from the Louisiana Supreme Court. App. to Pet. for Cert. A1-A24; *Wynat Development Company v. Board of Levee Com'rs,* 97-2121 (La. 4/14/98), 710 So. 2d 783. That decision, which petitioners hope to reverse, turned on the interpretation of two prescriptive periods governing claims for property appropriated for levee purposes, one enacted in 1958, La. R.S. 9:5626, and one enacted in 1975, La. R.S. 13:5111. *See* App. to Pet. for Cert. A1. The Louisiana Supreme Court found the earlier period implicitly repealed by the later prescriptive measure, which "repealed such previous acts and parts of acts as were inconsistent with its provisions," and held petitioners' suit filed more than three years after the taking prescribed. *See id.*; *Holden v. State of Minnesota,* 137 U.S. 483, 490, 11 S. Ct. 143, 146, 34 L. Ed. 734 (1890).

Petitioners Wynat Development Company and Wynat Development Corporation assail that outcome under the takings and due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Pet. for Cert. 7. Principally advancing a due process claim, petitioners decry what they regard as the furtive repeal of the earlier prescriptive period by the later one. They maintain that "the effective date of the repeal . . . was April 14, 1998, the date the court rendered its decision holding same to be the law." *See* Pet. for Cert. 19. They accordingly claim that when the Louisiana Supreme Court refused to make the decision prospective as to the parties, it deprived them of a vested remedy in derogation of their due process rights. (The parties agreed that the suit was timely under the old statute). Petitioners, in summary, contend that when the court below applied the later of the two statutes to the litigants before it, the court engaged in

"the type of retroactivity which is condemned by law." *Chenery Corp., infra*, 332 U.S. at 203, 67 S. Ct. at 1581.

For all of the reasons discussed below, the due process and takings issues this case presents were rejected in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982). In addition, the petition presents no important federal question that has been decided in a way that conflicts with the decisions of this Court. The petition should therefore be denied.

This case specifically concerns the appropriation[1] of riparian property adjacent to the Mississippi River in New Orleans at the

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1. Appropriation is a term of art in Louisiana. It refers to the taking of land for public purposes without the initiation of a formal expropriation proceeding. *Hawthorne v. La. Dept. of Public Works*, 540 So. 2d 1261, 1262 (La. App. 3rd Cir. 1989). In its more pertinent connotation for the purposes of this case, it refers to the taking of a servitude. *DeSambourg v. Board of Com'rs*, 621 So. 2d 602, 603 n.2 (La. 1993). Critically, petitioners concede that their property was riparian property, and that the taking in this case was for levee construction purposes. Pet. for Cert. 7. *Cf. Wynat*, 710 So. 2d at 784. Settled Louisiana law provides that "title to riparian lands [is] burdened with the legal servitude for levee . . . use . . ." *DeSambourg, supra*, at 606. Thus, riparian property may be appropriated at any time for levee and levee construction purposes. *Ibid.* Indeed, Louisiana law provides that all riparian property is held " '*sub modo*, i.e., subject to the right of the public to reserve space enough for levees, public roads, and the like.' " *DeSambourg, supra*, at 604 n.2. (Citation omitted). Consequently, it is said that " '[o]ver this space, the front proprietor never acquires complete dominion. It never passes free of this reservation by deed to purchaser.' " *Ibid.* There will be further discussion in text of various codal and other authorities touching on the legal servitude for levee purposes. The Court will, however, find these principles well and thoroughly examined in *Eldridge v. Trezevant, infra*, which concerned the claim of a resident of Mississippi *in this court* for just compensation under the Fourteenth Amendment. Part of Eldridge's Louisiana plantation was appropriated for the construction of a levee. He was aggrieved by the fact that, at the time of

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request of the U.S. Army Corp. of Engineers ("COE"). Respondent, the Board of Commissioners of the Orleans Levee District ("Levee District"), a political subdivision of the State of Louisiana, appropriated the property to facilitate the COE's Algiers Point Levee Setback, Levee Enlargement and Slope Pavement Project.[2] *See* App. to Pet. for Cert. A2; *Wynat Development Company v. Bd. Of Levee Com'rs*, 97-2121 (La. 4/14/98), 710 So. 2d 783, 784.

The substantive authority of the Sovereign State of Louisiana to appropriate land for the erection of levees is more than two centuries old and is utterly beyond question. *See, e.g., General Box Company v. United States*, 351 U.S. 159, 160, 76 S. Ct. 728, 730 (1956) ("Since colonial days batture has been subject to a servitude of the State for use in the construction and maintenance of levees.") *See also Eldridge v. Trezevant*, 160 U.S. 452, 463, 16 S. Ct. 345, 346-347, 40 L. Ed. 490 (1896) (noting levee servitude's origin in Code Napoleon); *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585, 587 (1934) ("The principle [i.e. the levee servitude]

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the taking in his case, no compensation was due the owner of riparian property when the state chose to exercise its levee servitude. This court found no violation of the constitutional rights of the petitioner in the noted case in view of the "*sub modo*" quality of his title as a matter of state law. This Court accordingly denied the petitioner any monetary relief. As discussed below in text, and as further discussed in the Louisiana Supreme Court's decision in this case, one of the reforms of the Louisiana Constitution of 1974 was a new scheme of compensation to the full extent of the loss for land taken for levee purposes. *See* LSA-R.S. 38:301 (West 1989).

2. The COE maintains the levee system on the Mississippi River pursuant to the Mississippi River Flood Control Act of 1928, 33 U.S.C. § 701, *et seq*. "Once the COE selects a site for levee improvement, local governments . . . are obligated . . . to appropriate the necessary riparian property." *See DeSambourg, supra*, 604 n.5. *See also General Box Company, infra*, 351 U.S. at 160-161, 76 S. Ct. at 730.

. . . is of ancient origin."); *DeSambourg*, 621 So. 2d at 607 (noting ordinance of 1743 which commanded planters along the Mississippi to make their levees safe under penalty of forfeiture of their lands to the Crown).

Respondent is a levee board, the one generally having jurisdiction over the City of New Orleans. *See* LSA-R.S. 38:291(K)(1) (West 1989). Levee boards "construct and maintain levees, . . . and do all other things incidental thereto." LSA-R.S. 38:301(A) (West 1989).

Petitioners assert that their constitutionally protected property interests have been prejudiced by the actions of the Levee District in a constitutionally impermissible manner. "Property interests are not," however, "created by the Constitution . . ." They are "created and . . . defined by existing rules and understandings that stem from an independent source such as state law."[3] In this case, those rules and understandings pertain to the ownership of land adjacent to the Mississippi River. The Mississippi River has, of course, had an enormous influence on the development of Louisiana law, and some of that has been charming.

Article 8 of the Louisiana Civil Code of 1808, for example, provided:

> L'usage des rivages des fleuves ou riviéres navigables, est public; en conséquence chacun peut librement y faire aborder ses vaisseaux, en attacher les cordages aux arbres qui y sont plantés, y décharger ses navires, y deposer ses marchandises, y faire sécher ses filets et autres usages semblables.

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3. *Texaco, Inc. v. Short*, 454 U.S. 516, 525, 102 S. Ct. 781, 790, 70 L. Ed. 2d 738 (1982), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

> Cependant la propriete des rivages des riviéres appartient á ceux qui out des terres joignantes.
>
> (The use of the shores of navigable rivers or creeks, is public; accordingly everyone has a right freely to bring his ships to land there, to make fast to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.
>
> Nevertheless the property of the river shores belong [belongs] to those who possess the adjoining lands.)

See LSA-C.C. art. 455 (West 1973) (Compiled Edition 1-2291).[4]

However, reasons considerably less charming than those that engendered article 8 of the Civil Code of 1808 countenanced the Levee District's appropriation in this case, reasons this Court has noted with more than a little sympathy in the past, as discussed below. A discussion of those reasons and of the rules and understandings they occasioned should nevertheless be prefaced by a brief explanation of the way in which Louisiana law has historically divided and qualified ownership.

For 150 years or so, Louisiana law divided ownership — "the right by which a thing belongs to someone in particular, to the exclusion of all other persons" — into perfect and imperfect ownership. *See* LSA-C.C. art. 488 (West 1973) (Compiled Edition 1-2291). Ownership was said to be "imperfect" when it was encumbered by a real right in favor of a third person, such as a servitude. *See id.* at art. 490.

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4. The current iteration of this article, article 456 of the Civil Code, states: "The banks of navigable rivers or streams are private things that are subject to public use." C.C. art. 456 (West Pamph. 1998) (Revision Comments — 1978(a)).

Subsequent revisions to the articles of the Civil Code relating to ownership discontinued the distinction between perfect and imperfect ownership. *See* C.C. art. 478 (West Pamph. 1998) (Revision Comments — 1979(b)).[5] That does not mean, however, that by the time of the taking in this case, Louisiana had ceased to recognize different species of ownership. On the contrary, the change was purely one in terminology. *Id.* at (a)-(b). At the time of the appropriation in this case, ownership could still be qualified by the existence of "a real right in favor of another person as allowed by law." C.C. art. 478 (West Pamph 1998).

The point, of course, is that the property of the petitioners in this case was encumbered by just such a real right. Petitioners have conceded that their property was riparian land. Pet. for Cert. 7 ("Petitioners were the owners of land located on the Mississippi River . . .") In Louisiana, such land is encumbered by a "predial servitude", that is, by "a charge on a servient estate for the benefit of a dominant estate." C.C. art. 646 (West Pamph. 1998).

> The owner of the servient estate is not required to do anything. His obligation is to abstain from doing something on his estate or to permit something to be done on it. He may be required by convention *or by law* to keep his estate in suitable condition for the exercise of the servitude due to the dominant estate.

C.C. art. 651 (West Pamph. 1998) (emphasis added).

By law, C.C. art. 654 (West Pamph. 1998), such riparian land is specifically burdened by the predial servitude for levees, which the law now designates a "legal public servitude." Article 665 of the Louisiana Civil Code states:

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5. It has been explained that this terminology was discontinued because "[m]odern civil codes do not draw a distinction between perfect and imperfect ownership; nor does the French Civil Code." *Id.* at (d).

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.
>
> All that relates to this kind of servitude is determined by laws or particular regulations.

C.C. art. 665 (West Pamph. 1998).[6]

In summary, the rules and understandings from which the property interests of the petitioners in this case arose enabled the Levee District to appropriate their property. Even petitioners concede that their property was land "located on the Mississippi River across from the City of New Orleans,"[7] and they do not

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6. The article just quoted dates back, verbatim, to the revised Civil Code of 1870. The prior code, the Civil Code of 1825, recognized the same servitude as article 661. LSA-C.C. art. 665 (West 1973) (Compiled Edition 1-2291). Indeed, the Civil Code of Louisiana *explicitly* mentioned the servitude "for the making or repairing of levees" as long ago as the Civil Code of 1808. *Ibid.* The rule is, however, of even more ancient origin, as *Pruyn* observed in 1934, *citing, inter alia, Morgan v. Livingston*, 6 Martin's Reports (O.S.) 19, 2 La. 9 (1819). As stated earlier, the rationale for this rule is touched on in *Eldridge v. Trezevant*, 160 U.S. at 464, 16 S. Ct. at 347, where this Court stated:

> In this state [i.e. Louisiana] so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi River, to the use of the space of ground necessary for the making and repairing of the public levees and roads. Civ. Code art. 665. It was the condition of the ancient grants of land on the Mississippi River, . . .

(Citation omitted).

7. Pet. for Cert. 7. That statement may be misleading. The property in question is in the City of New Orleans.

seem to contend that their property was taken illegitimately. Their aggrievement is rather founded on the fact that their property was taken without payment, but, as stated earlier, that fact was occasioned by the lateness of their claim in the face of an existing and even mature statute of limitations, La. R.S. 13:5111, whose title expressly mentioned "appropriation." LSA-R.S. 13:5111 (West 1991).

The relevant rules and understandings from which the property interests in this case arose now become conspicuously more relevant to the disposition of the petition. Under *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982), petitioners were chargeable with knowledge (a) that their ownership was burdened by the legal servitude for levees; (b) that "appropriation" refers to the taking of a servitude"; and (c) that appropriation is "a mode for the state and its political subdivisions to exercise [their] levee servitude . . ." *DeSambourg*, 621 So. 2d at 604 n.2. *See also Texaco, Inc.*, 454 U.S. at 533, 102 S. Ct. at 793 ("It is well established that persons owning property within a state are chargeable with knowledge of relevant statutory provisions affecting the control or disposition of such property.") (Footnote omitted).

The reason such constructive knowledge is significant in this case is notice. La. R.S. 13:5111, the prescriptive statute on which the dismissal of the petitioners' suit rested, is entitled, "Appropriation of property by state . . . or agencies thereof; . . . prescription." LSA-R.S. 13:5111 (West 1991). La. R.S. 13:5111 became effective on September 12, 1975, eight years *before* the taking in this case. Petitioners have raised the violation of their due process rights as a reason for reversing the decision below, but since " 'notice' or 'fair warning' [i]s the analytic touchstone of due process . . . analysis," the knowledge with which the petitioners in this case may be charged is highly significant. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 112 S. Ct. 1904, 1913, 119 L. Ed. 2d 91 (1992).

From their constructive knowledge of La. R.S. 13:5111, which was a mature statute by the time of the appropriation in this case, petitioners should have realized that there were serious risks in not bringing a timely action under La. R.S. 13:5111. As discussed below, petitioners had a number of months after the levee work in this case was completed and the damages presumably became clear to bring a timely action under La. R.S. 13:5111, but they did not.

> Their property loss was [thus] one [petitioners] could have avoided with minimal burden; it was [accordingly] their failure to file on time – not the action of [the State] – that caused the property right to be extinguished.

United States v. Locke, 471 U.S. 84, 108, 105 S. Ct. 1799, 85 L. Ed. 2d 64 (1985).

B. Facts

"The facts are not in dispute." Pet. for Cert. 7. *Wynat*, 710 So. 2d, at 784:

> On July 20, 1983, pursuant to a request by the U.S. Corp. of Engineers to furnish the necessary rights of way to construct the Algiers Point levee setback, levee enlargement and slope pavement project, [respondent], the Board of Levee Commissioners for the Parish of Orleans . . . adopted a resolution appropriating an eight-foot strip of Wynat's land located at Algiers Point for the purpose of building of cueing lane for vehicular traffic which was required to accommodate the levee setback. Notice of the appropriating resolution was given to Wynat by the Levee Board by letters dated July 26, 1983, and August 15, 1983. Attached to the July 26, 1983, letter was a map which designated the exact dimensions of the 8-ft. strip of land. In brief,

> Wynat [has] concede[d] it received written notice of the Levee Board's appropriating resolution on August 15, 1983. (Footnote omitted).

Ibid.

C. Proceedings Below

When petitioners and respondent

> could not agree on either the amount of compensation for the land actually used and destroyed or on the amount of severance and other consequential damages related to the remaining property,

Wynat, 710 So. 2d at 784, petitioner filed this action for compensation in the Civil District Court for the Parish of Orleans. It did so on April 16, 1987. In reply, the Levee Board interposed the exception of prescription, which the trial court sustained. *Ibid.* The Louisiana Fourth Circuit Court of Appeal affirmed,[8] whereupon the petitioner in this case sought, and the Supreme Court of Louisiana granted, a writ of certiorari or review. *See Wynat Development Company v. Board of Levee Com'rs for Parish of Orleans,* 97-2121 (La. 11/21/97), 703 So. 2d 634.

On April 14, 1998, the Louisiana Supreme Court issued its decision on the merits, affirming the decisions below and dismissing the suit of petitioners; it denied rehearing on June 26, 1998. *Wynat,* 710 So. 2d at 783.

D. The Nature of the Legal Controversy

The reasoning which culminated in the dismissal of petitioners' suit for compensation may have been somewhat arcane,

8. *Wynat Development Company v. Board of Levee Com'rs for Parish of Orleans,* 96-1983 (La. App. 4th Cir. 5/30/97), 696 So. 2d 163.

but at its core, the dispute between the parties was over which of two prescriptive periods applied to this suit for "just compensation." Respondent urged La. R.S. 13:5111, which in pertinent part provides as follows:

> ***Appropriation of property by state, parish, municipality or agencies thereof; attorney, engineering and appraisal fees; prescription.***
>
> A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the State of Louisiana, a parish, or municipality, or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, ***other than through an expropriation proceeding***, shall determine and award to the plaintiff, . . . such sum as will . . . compensate for reasonable attorney fees actually incurred because of such proceeding. . . . ***Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.*** (Emphasis added).

LSA-R.S. 13:5111(A) (West 1991).[9]

The foregoing statute was enacted by the Louisiana Legislature in 1975, eight years before the petitioners received a letter from the Orleans Levee District, notifying them of the appropriation of their riparian property. *See* Act 1975, No. 434 (attached as Appendix A); *see also* LSA-R.S. 13:5111 (West 1991)

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9. There is no dispute that the Orleans Levee District is a political subdivision of the state for the purposes of this statute. *Wynat,* 710 So. 2d at 789-790.

(Historical and Statutory Notes).[10] That fact is highly germane to the due process argument of the petitioners in this case for a number of reasons presently to be discussed, but primarily because

> persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them, . . . especially . . . with respect to those statutes relating to the . . . condemnation of land.

Texaco, Inc., 454 U.S. at 533, 102 S. Ct. at 793 n.25, *quoting North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S. Ct. 491, 494, 69 L. Ed. 953 (1925).

Wynat nevertheless urged as the applicable prescriptive period an even older statute, LSA-R.S. 9:5626, which provided:

> Actions and claims for lands and improvements used or destroyed for levees or levee drainage purposes:
>
> When lands are appropriated for levees or levee drainage purposes, all claims and actions for *payment under Article XVI, Section 6 of the Constitution of 1921* for lands and improvements thereon actually used or destroyed for levees or levee drainage purposes shall prescribe within two years from the date on which the

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10. La. R.S. 13:5111 commences prescription on the date of the taking. When a taking occurs by appropriation, the taking becomes complete when the political subdivision adopts a resolution to that effect. *Wynat*, 710 So. 2d at 786; *Orleans Levee District v. Aurianne*, 229 La. 83, 85 So. 2d 39 (1956); *Danziger v. United States*, 93 F. Supp. 70 (E.D. La. 1950). The courts, however, say that prescription in such cases does not begin to run until the property owner has notice of the resolution. *Rivet v. State*, 93-369 (La. App. 5th Cir. 3/16/94), 635 So. 2d 295. "Wynat concedes it received written notice of the . . . resolution on August 15, 1983." App. to Pet. for Cert. A2 (footnote omitted).

> property was actually occupied and used or destroyed for construction of levees or levee drainage works . . . (Emphasis added).

LSA R.S. 9:5626 (West 1991).

La. R.S. 9:5626 was enacted in 1958 in an extra session of the legislature. *See* LSA-R.S. 9:5626 (West 1989) (Historical and Statutory Notes). Acts 1958, Ex. Sess. No. 11, § 1.

La. R.S. 9:5626 applied, under its plain language, to claims for compensation under the assessed value compensation scheme of the Louisiana Constitution of 1921, something the Louisiana Supreme Court found this suit not to be. *See* App. to Pet. for Cert. A15; *Wynat,* 710 So. 2d at 789 ("Wynat has, in fact, asserted a cause of action under this new compensation scheme found in La. R.S. 38:301; not one under art. 16, § 6 of the 1921 Constitution.") As amended by Act 165 of 1928, article XVI, § 6 of the Louisiana Constitution of 1921 provided that lands taken for levee purposes were only to be paid for "at a price not to exceed the assessed value of the preceding year . . ." *Wynat*, 710 So. 2d at 786.

The Levee District conceded that the claim of the petitioners was not prescribed if La. R.S. 9:5626 was applicable. *Wynat*, 710 So. 2d at 785 n.3. The Levee District recognized that the project was not completed until the summer of 1985, *Wynat*, 710 So. 2d at 784, and that prescription under § 5626 does not commence until the levee work is complete. *See id.* (As noted earlier, prescription under § 5111 commences, in contrast, on the date the landowner receives notice of the appropriating resolution.)

In nevertheless opposing the application of § 5626 to the facts of the present case, the Levee District made four overarching points: first, that § 5111 was enacted several years before the date of the appropriation in this case, in connection with the state's waiver of its sovereign immunity; second, that the title of the statute

explicitly referred to appropriation, which is understood to be a term of art referring to the taking of a servitude; third, that the clear and unambiguous language of the later statute, La. R.S. 13:5111, clearly encompassed the taking in this case, and fourth, that, in contrast, the clear language of § 5626 confined its application to suits under article XVI, § 6 of the Constitution of 1921. For that and other reasons rooted in the Louisiana Constitution of 1974 and in subsequent actions of the Louisiana Legislature, reasons petitioners have now "eschewed" in favor of a purely constitutional argument regarding "the temporal reach of a court adjudication that establishes new law", Pet. for Cert. 11, the Louisiana Supreme Court affirmed the dismissal of petitioners' suit. App. to Pet. for Cert. A21.

One final point deserves emphasis, since it is at the heart of the controversy in this Court. When the legislature enacted Act 434, it repealed "[a]ll laws or parts of laws in conflict herewith . . ." *Wynat*, *supra*, 710 So. 2d at 785 n.5; Acts 1975, No. 434, § 3.

In common with this court, see *Tennessee Valley Authority v. Hill, infra,* Louisiana does not favor repeals by implication, *Macon v. Costa*, 437 So. 2d 806, 810 (La. 1983). Nevertheless, Louisiana law provides that "[a] subsequent general statute dealing specifically with a particular subject supersedes and repeals inconsistent and conflicting provisions in an earlier statute." *See id.* at 809. *Cf. Eastern Extension, infra,* 231 U.S. at 332, 34 S. Ct. at 58 (statute repealing inconsistent enactments generally raises issues of legislative intent).[11] Petitioners in this case claim not to

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11. Interestingly, the Attorney General of the State of Louisiana pronounced the constitutional and then statutory predicate of § 5626, § 6 of article 16 of the Constitution of 1921, " 'no longer viable as a statute and . . . repealed by implication,' " in 1976. LSA-R.S. 9:5626 (West Supp. 1998) (citation omitted). *Cf. Wynat,* 710 So. 2d at 788 ("*See also* Historical and

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have understood that La. R.S. 13:5111 superseded La. R.S. 9:5626 until the Louisiana courts declared it openly years after the taking in this case occurred. Citing Chief Justice Calogero's passing reference to La. R.S. 9:5626 in his lone dissent in *West Jefferson Levee Dist. v. Coast Const. Co.*, 640 So. 2d 1258, 1302 (La. 1993), "as an example of the lack of expression of repeal by the legislature," Pet. for Cert. 16 n.8, petitioners assert: "Because there was no specific act or expressed legislative intent to repeal La. R.S. 9:5626, petitioners' counsel was without precedent or legal authority to declare the statute dead." *See id.* at 16.

That argument is not new to this Court. *See Texaco, Inc.*, 454 U.S. at 537, 102 S. Ct. at 795-796 ("[I]t has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before the law may affect his property rights.")

REASONS FOR DENYING THE WRIT

I.

THE OUTCOME IN THIS CASE REPRESENTS NEITHER AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION NOR A TAKING IN VIOLATION OF THE DUE PROCESS RIGHTS OF THE PETITIONERS.

Analytically, this case is controlled by *Texaco Inc. v. Short* and *United States v. Locke*, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985).

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Statutory Notes, Constitution Ancillaries, Const. 1921, art. 16, sec. 6 (West 1996) (Pursuant to the statutory revision authority of the Louisiana State Law Institute, La. Const. Of 1921, art. 16, § 6 is no longer set forth as live text and is noted to be 'repealed by implication.' ")).

Petitioners contend that the Louisiana Supreme Court decision in this case unconstitutionally deprived them of a remedy[12] for the

12. For many years, Louisiana afforded no compensation whatsoever for the exercise of the levee servitude. *DeSambourg*, 621 So. 2d at 607-608. *Eldridge v. Trezevant* expressly held that such takings did not offend the United States Constitution. *Eldridge*, 160 U.S. at 468-469, 16 S. Ct. at 349. This practice first began to change in the late nineteenth century with regard to property in Orleans Parish; it subsequently changed statewide by virtue of the Louisiana Constitution of 1921, article 16, § 6, which in pertinent part provided for the payment of compensation " 'at a price not to exceed the assessed value of the preceding year' " with regard to " '[l]ands and improvements thereon actually used or destroyed for levees or levee drainage purposes.' " *DeSambourg*, 621 So. 2d, at 608 n.12. A new state constitution in 1974 launched the State on a major reform of the compensation payable to owners of riparian land taken for levee purposes by enabling the Legislature to increase the compensation payable "from 'assessed value' to 'fair market value to the full extent of the loss,' " which the Legislature eventually did by enacting Acts 314 of 1978 and 676 of 1979. App. to Pet. for Cert. A13-A14; *Wynat*, 710 So. 2d at 788. Section 10(C) of Article 12 of the Constitution of 1974 further ordered the Legislature to enact a set of procedures for suits against the State, in part because the new Constitution abolished the State's existing sovereign immunity and there would soon be a multitude of suits against the State pursuant to the new waiver of immunity. LSA-Const. Art. 12, § 10(C). The new Constitution became effective on January 1, 1975. *Terrebonne v. South Lafourche Tidal Control*, 445 So. 2d 1221 (La. 1984). Act 434 of 1975, the legislation that enacted the statute of limitations that eventually prompted the dismissal of the present suit for compensation, emanated from the first session of the Legislature following the adoption of the new Constitution. Act 434's preamble explained that the bill was intended

> [t]o amend and reenact Part XV of Chapter 32 of Title 13 of the Louisiana Revised Statutes of 1950, comprised of R.S. 13:5101 through R.S. 13:5111, relative to suits against the state, state agencies, or political subdivisions.

Acts 1975, No. 434. *See* LSA-R.S. 13:5101 (West 1991) (Historical and Statutory Notes). Among those provisions was § 5111(A), which in pertinent

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Levee District's appropriation by: (a) invalidating a long standing law after the taking had occurred; (b) announcing a repeal of an old law by implication, thus disturbing a vested property right; (c) legislating a new law by court decision and applying it retroactively in derogation of a vested property right; and (d) depriving petitioners of fair notice, i.e., due process of law. *See* Pet. for Cert. 12, 13, 14, 18 & 20.

In actuality, the entirety of the argument can be summed up as a lament that the petitioners did not know, and in the exercise of reasonable diligence could not have known, that La. R.S. 13:5111 provided the applicable rule of decision with regard to prescription in this case until the Louisiana Supreme Court decided that it did eleven (11) years after petitioners filed their suit. Pet. for Cert. 16. (". . . petitioner's counsel was without precedent or legal authority to declare [La. R.S. 9:5626] dead.") Considering the absence of a jurisprudential statement to the contrary and the additional absence of an explicit statement by the Legislature that La. R.S. 13:5111 was intended to repeal La. R.S. 9:5626, petitioners insist that the Louisiana Supreme Court decision in this case amounted to an "ex-post facto invalidation of La. R.S. 9:5626 [which] constituted new law and should not be applied retroactively . . ." Pet for Cert. 17-18.

This argument founders upon the fact "[e]very case of first impression has a retroactive effect . . .", *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203, 67 S. Ct. 1575, 1581, 91 L. Ed. 1995 (1947). That quality alone hardly justifies a conclusion that retroactive application of the new standard "is . . . the type of retroactivity which is condemned by law," however. *See id.*

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part read: "Actions for compensation for property taken by the state. . . or other political subdivision shall prescribe three years from the date of such taking."

The Louisiana Supreme Court decision in this case "merely construed § [5111], in accordance with the clear language of the statute . . ." *United States v. Estate of Donnelly*, 397 U.S. 286, 293, 90 S. Ct. 1033, 1037, 25 L. Ed. 2d 312 (1970). As discussed below in connection with the corresponding rule of state law that a decision construing statutory language operates both prospectively and retroactively, the rule in this Court appears quite uniformly to be that "parties[ ] [are] entitled to adhere to what [they] believe[ ] to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case." *See id.* at 294, 90 S. Ct. at 1038. *See also Simpson v. Union Oil Co. of California*, 396 U.S. 13, 14, 90 S. Ct. 30, 31, 24 L. Ed. 2d 13 (1969) ("Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative."); *Solem v. Stumes*, 465 U.S. 638, 642, 104 S. Ct. 1338, 1341, 79 L. Ed. 2d 579 (1984) ("As a rule, judicial decisions apply 'retroactively.' ") (Citation omitted)); *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d (1987) (noting limits on retroactive application of decision concerning statute of limitations when decision overrules clearly established precedent).[13]

The rule the Louisiana Supreme Court announced in this case was hardly innovative. Once again, La. R.S. 13:5111 was enacted eight years before the Levee District appropriated petitioners' property, and petitioners were charged, not only with knowledge of the statute, *i.e.*, La. R.S. 13:5111, but with: (a) knowledge of the statute's title, which encompassed "[a]ppropriation"; and (b)

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13. There is nothing comparable to the concern that prompted this limitation on the retroactive application of a statute of limitations decision in the instant petition. The matter was *res nova* in Louisiana before the current litigation. *Cf.* Pet. for Cert. 16 n.8 (mentioning *dissent* in 1993 Louisiana Supreme Court case).

knowledge that appropriation pertains to the taking of a servitude. LSA-R.S. 13:5111 (West 1991); *Texaco, Inc.*, 454 U.S. at 533, 102 S. Ct. at 793 n.25. (constructive knowledge of statutes extends " 'especially to those statutes relating to the . . . condemnation of land.' ")

In the Louisiana Supreme Court, Wynat essentially argued that such knowledge would have produced irrational consequences and that it should therefore not be faulted for having dismissed § 5111 as the rule of decision. Wynat urged that whereas a suit under § 5626 would necessarily be timely and ripe because no action could accrue under § 5626 until the levee work was complete, a timely suit under § 5111 could well be premature if the work was not complete and the landowner's damages were correspondingly unclear. *Wynat,* 710 So. 2d at 790-791.

Treating this as an argument that the decision below was unexpected and thus innovative in the *Simpson* sense, it is worth noting that the argument conveniently ignored the language of the statute on which Wynat relied for a broad remedy, namely, LSA-R.S. 38:301 (West 1998). That statute, which enables a landowner to receive fair market value compensation to the full extent of his or her loss, further confers on the owner the right to assess damages *in futuro*, by "taking into consideration the effects of the completion of the project in the manner *proposed or planned*." LSA-R.S. 38:301(C)(1)(b) (West 1988) (emphasis added).[14] Thus, Wynat had every opportunity to file a timely action in this case, even if every item of damage had not yet physically materialized. Expert testimony would have been admissible under the statute to prove those future damages. *See Wynat,* 710 So. 2d at 790-791 (for, *inter alia*, reasons just stated, landowner's right to enforce levee district's obligation and to obtain judgment

14. This statute was enacted prior to the taking in this case. *See id.* (Historical and Statutory Notes). *See also Wynat*, 710 So. 2d at 788-789 (§ 301 is reenactment of La. R.S. 38:281, enacted by Act 314 of 1978, and amended as to Orleans Levee District by Act 676 of 1979).

awarding damages accrues with passage of appropriating resolution). Moreover, even under the statute that extinguished Wynat's remedy, La. R.S. 13:5111, eight months for timely action remained when the Corps completed its work.[15]

For all of these reasons, there is as much justification in this case as there was in *Texaco* for saying:

> 'What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights.'

Texaco, Inc., supra, 454 U.S. at 526, 102 S. Ct. at 290 (citation omitted).[16]

In other words, the response to the takings claim of the petitioners is that this Court does not "require[] the State to compensate the owner for the consequences of his own neglect." *Id.*, 454 U.S. at 531, 102 S. Ct. at 792.

The crux of the petition in this case is nonetheless the claim that the petitioners had no notice that La. R.S. 13:5111 superseded La. R.S. 9:5626 until the Supreme Court handed down its decision in this proceeding, as stated earlier. *See* Pet. for Cert. 19.

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15. Work was finally completed in December of 1985. Pet. for Cert. 8. Petitioners received, they concede, notice of the appropriation in August of 1983, as stated earlier. Hence, prescription commenced in August of 1983. LSA-R.S. 13:5111 (West 1991); *Rivet v. State, supra*. The prescriptive period would therefore not have expired until August of 1986, or some eight months after the completion of the work in December of 1985.

16. As a matter of fact, the case of the petitioners in this matter is less compelling than the one of the petitioners in *Texaco, Inc.* because quite a few of the appellants in *Texaco* acquired their mineral interests 20 years or more before the Indiana Legislature enacted the Dormant Mineral Interests Act. *Id.*, 454 U.S. at 522, 102 S. Ct. at 787. In the present case, in contrast, the Legislature enacted the new statute of limitations years before the taking occurred and thus years before the claim to compensation accrued or vested.

In *Texaco,* Justice Stevens' characterized such a challenge as one that concerns "how a legislature must go about advising its citizens of [the] actions that must be taken to avoid [the prejudicial effect] of a valid rule of law . . ." *Ibid.* Since "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of [their] property," *see id.* at 533, 102 S. Ct. at 781, *Texaco* indicates that it is generally sufficient for "a legislature . . . [to] enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id.*, 454 U.S. at 533, 102 S. Ct. at 793. In *Texaco, Inc.,* the court specifically considered a "two year period", and deemed that sufficient. *Ibid.*

In the present case, it is undisputed that the petitioners had at least three years from the date of the appropriation to familiarize themselves with the substance of La. R.S. 13:5111. That is, presumably, also constitutionally sufficient.

II.

A COURT DECISION ANNOUNCING THE EFFECT OF A STATUTE ENACTED YEARS BEFORE A PROPERTY OWNER'S REMEDY BECAME VESTED IS NOT MADE IMPERMISSIBLY RETROACTIVE BY ITS PREJUDICIAL IMPACT ON THE LANDOWNER'S RIGHTS.

Petitioners insist on characterizing the Louisiana Supreme Court opinion in this case as one whose impact was impermissibly retroactive in a due process sense, as stated earlier. Pet. for Cert. 20. To the allegation of legally condemned retroactivity quoted earlier, one can add, for example, the following, curious assertion:

> In the instant case, the effective date of the repeal of La. R.S. 9:5626 and applicability of La. R.S. 13:5111,

> was April 14, 1998, the date the court rendered its decision holding same to be the law.

Pet. for Cert. 19.

This is simply not a correct statement of the law, either as a matter of state law or as a matter of constitutional principle. It was not the Louisiana Supreme Court but rather the Legislature of Louisiana that effected the repeal of La. R.S. 9:5626 by enacting section 3 of the Act, which explicitly repealed all laws or parts of laws inconsistent with the Act. The only thing the Louisiana Supreme Court did was implement the "intention to repeal" the Legislature avowed in section 3 of the Act. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191, 28 S. Ct. 2279, 2299, 57 L. Ed. 2d 117 (1978) (citation omitted). *See also Eastern Extension, Australasia & China Telegraph Company v. United States*, 231 U.S. 326, 332, 34 S. Ct. 57, 58, 58 L. Ed. 250 (1913) (when statute repeals inconsistent enactments generally, "[t]he question is one of legislative intent.")

The intention to repeal section 5626 was furthermore apparent from the legislative history of Act 434 of 1975. As noted earlier in footnote 12, La. R.S. 13:5111 emerged from the Louisiana Constitution of 1974, which ordered the Legislature to "provide a procedure for suits against the state, a state agency, or a political subdivision." LSA-Const. Art. 12, § 10(C) (West 1996) (Historical Notes). Act 434's preamble — "an Act [t]o amend and reenact [laws] relative to suits against the state, state agencies, or political subdivisions" — showed that the Act was a direct response to the Convention's directive. LSA-R.S. 13:5101 (West 1991) (Historical and Statutory Notes). That was important because it illuminated the Legislature's intention to adopt one uniform statute of limitations for actions against the State with regard to takings other than by expropriation.

The Constitutional Convention had ordered procedures for suits against the State because the 1974 Constitution abrogated Louisiana's immunity from suits to which it did not consent. *Hamilton v. City of Shreveport,* 247 La. 784, 174 So. 2d 529 (1965). The Convention obviously anticipated that there would be a corresponding increase in the number of suits against the state, and that a uniform set of procedures for such suits would be desirable. *See also Chamberlain v. State Through Dept. of Transp. and Development*, 624 So. 2d 874 (La. 1993) (tracing history of sovereign immunity in Louisiana constitutions). It accordingly ordered the Legislature to adopt a suitable set of procedures, to which the Legislature reacted by enacting Act 434 of 1975. But it is also evident that in doing so, the Legislature determined that it would be advisable to adopt one uniform statute of limitations for any action against the state or one of its subdivisions for the taking of private property "other than through an expropriation proceeding." LSA-R.S. 13:5111(A) (West 1991).

Such a specific intention would have, for example, given the Legislature ample cause to repeal all laws or parts of laws inconsistent with the new Act. Acts 1975, No. 434, § 3 (attached). The appearance of the general repealer clause in the new legislation could easily be viewed as confirming that intention. In addition, however, the general repealer clause should have put everyone on notice of the fact that the Legislature wanted the new procedures to displace inconsistent existing procedures and that a commensurate level of caution would thenceforth be necessary with regard to the interpretation of Act 434.

In addition, since the preamble of Act 434 indicated that the Act was a reaction to the new Constitution's waiver of sovereign immunity; and since that waiver furnished the Legislature with substantial reason to expect a plethora of suits against the state for damage to property, there was corresponding reason to establish one uniform statute of limitations for such suits. Act 434 deserved to be interpreted accordingly.

Third, there was additional cause in the scope and breadth of the Act's terminology for surmising that the establishment of one uniform statute of limitations was the Legislature's objective. Section 5101 of the Act stated, for example, that the Act applied to "*any* suit . . . for injury . . . to property against the state, or a political subdivision of the state, as defined herein . . ." *See id.* at § 5101 (emphasis added). Section 5102(B) of the Act defined the state and its subdivisions in the broadest possible terms, more broadly, certainly, than the earlier legislation. Likewise, § 5111 swept very broadly, covering "the state, a parish, municipality, or other political subdivision or any one of their respective agencies."

In contrast, La. R.S. 9:5626 applied solely to actions for lands appropriated for levee purposes. Additionally, it harkened back to a bygone era of different rights and relationships between the state and its people, one overtaken by seminal, legal changes initiated by the Constitution of 1974. Section 5626 was specifically tailored to a provision of the Constitution of 1921 that stood, in that era, as an exception to the general immunity of the state against suits for damages. *See* LSA-Const. 1921, Art. III, § 35 (West 1977) (Early Constitutions) (setting forth immunity of state). *See also Hamilton, supra.* The precise legislative history of La. R.S. 9:5626 is that § 5626 was enacted to fill a gap in legislation as to when an action under Article XVI, § 6 of the 1921 Constitution would prescribe. It was explained in *A.K. Roy, Inc. v. Board of Commissioners,* 237 La. 541, 111 So. 2d 765, 767 n.9 (1959), that prior to the adoption of La. R.S. 9:5626, the law was unclear regarding when such actions prescribed.

There is no indication that the Legislature intended anything more with La. R.S. 9:5626 than to provide a prescriptive period for actions against the state under Article XVI, § 6, of the Constitution of 1921. As has already been observed, however, this suit was never filed on that basis. It was therefore specious for petitioners to maintain that their reliance on § 5626 was reasonable: (a) when article XVI was discontinued five years before the

appropriation of their property; (b) when they therefore chose to pursue the new and more profitable remedy for appropriation which replaced article XVI, La. R.S. 38:301; and (c) when they are deemed to have known that the later statute covering the same limitations subject-matter, without the antiquated language, commenced prescription in a markedly different way. *See* App. to Pet. for Cert. A15 ("Wynat has, in fact, asserted a cause of action under this new compensation scheme found in La. R.S. 38:301; not one under art. 16, § 6 of the 1921 Constitution.")

Wynat's contention that it was not apparent that § 5626 was repealed by La. R.S. 13:5111 until the Louisiana Supreme Court opinion in this case is therefore without merit.

Furthermore, even if one assumes that the repeal of La. R.S. 9:5626 did not become truly apparent until the Legislature abrogated art. 16, § 6 of the 1921 Constitution by enacting Act 314 of 1978, *see* App. to Pet. for Cert. A13, petitioners did not have a constitutional right to have the repeal explained to them. To the contrary, as Justice Stevens remarked in *Texaco*, "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before the law may affect his property rights." *Texaco, Inc.*, 454 U.S. at 537, 102 S. Ct. at 795-796.

For its part, Louisiana law does not equate the interpretation of statutory language with the creation of new law; a decision that construes statutory language therefore operates on existing cases as a matter of state law. *Tugwell v. State Farm Ins. Co.*, 609 So. 2d 195 (La. 1992). This is a view that is shared by this court. *See, e.g., Estate of Donnelly*, 397 U.S. at 293, 90 S. Ct. at 1037 (decision construing statute in accordance with its language binds litigants in pending case absent prior final judgment to contrary).

There is therefore no merit to the argument that the due process rights of the petitioners have been violated by the retroactive application of a law of which they had no notice. They assail a statute that was enacted years *before* their cause of action vested. Petitioners were charged with knowledge of that statute, and they are regarded by the law as having had years to study its implications. There was certainly reason to wonder whether La. R.S. 9:5626 had any continuing vitality after the Legislature abrogated the prior assessed value scheme of compensation in 1978, but there was also earlier reason to wonder about the vitality of § 5626. *See, e.g.,* footnote 11, *supra.*

CONCLUSION

The petition in this case is controlled by *Texaco,* and what *Locke* said of *Texaco* is equally apropos here:

> "this Court has never required [the State] to compensate [a property] owner for the consequences of his own neglect." 454 U.S. at 530, 102 S. Ct. at 792. [Petitioners] failed to inform themselves of the proper filing deadline and failed to file in timely fashion . . . Their property loss was one [they] could have avoided with minimal burden; it was their failure to file on time — not the action of [the state] — that caused the property right to be extinguished. Regulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.

Locke, 471 U.S. at 108, 105 S. Ct. at 1799.

Respondent, Board of Commissioners of the Orleans Levee District, therefore respectfully prays for denial of the petition for certiorari herein.

Respectfully submitted,

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APPENDIX

APPENDIX A — ACTS 1975, NO. 434; LSA-R.S. 13:5101 (WEST 1991) (HISTORICAL AND STATUTORY NOTES; LSA-R.S. 13:5111 (WEST 1991) (HISTORICAL AND STATUTORY NOTES)

ACT No. 434

House Bill No. 1623. By: Mr. Casey (Introduced pursuant to H. C. R. No. 133).

AN ACT

To amend and reenact Part XV of Chapter 32 of Title 13 of the Louisiana Revised Statutes of 1950, comprised of R.S. 13:5101 through R.S. 13:5111, relative to suits against the state, state agencies, or political subdivisions.

Be it enacted by the Legislature of Louisiana:

Section 1. Part XV of Chapter 32 of Title 13 of the Louisiana Revised Statutes of 1950, comprised of R.S. 13:5101 through R.S. 13:5111, is hereby amended and reenacted to read as follows:

PART XV. SUITS AGAINST STATE, STATE AGENCIES, OR POLITICAL SUBDIVISIONS

§5101. Application

This Part applies to any suit in contract or for injury to person or property against the state, a state agency, or a political subdivision of the state, as defined herein, and also applies to any other suit expressly authorized by special or general law or resolution adopted by the legislature.

Appendix A

§5102. Definitions

A. As used in this Part, "state agency" means any board, commission, department, agency, special district, authority, or other entity of the state, but does not include any political subdivision or any agency of a political subdivision.

B. As the term is used in this Part, "political subdivision" means any parish, municipality, special district, school board, public board, institution, department, commission, district, corporation, agency, authority, or an agency or subdivision of any of these, and other public or governmental body of any kind which is not a state agency.

§5103. Determination of procedural questions

All procedural questions arising in suits on claims against the state, state agencies, or political subdivisions shall be determined, except as the contrary is specified in this Part, in accordance with the rules of law applicable to suits between private parties.

§5104. Venue

A. All suits filed against the state of Louisiana or any state agency may be instituted before the district court of (the judicial district in which the state capitol is located or in the district court having jurisdiction in the parish in which the cause of action arises.

B. All suits filed against a political subdivision of the state may be instituted before the district court of the judicial district

in which the political subdivision is located or in the district court having jurisdiction in the parish in which the cause arises.

§5105. Jury trial prohibited

No suit against the state or a state agency or political subdivision shall be tried by jury.

§5106. Limitation

No suit against the state, state agency, or political subdivision shall be instituted in any court other than a Louisiana state court.

§5107. Service of citation and process

In all suits filed against the state of Louisiana or a state agency or political subdivision of the state, citation and service may be obtained by citation and service on the attorney general of Louisiana, or on any employee in his office above the age of sixteen years, or on a district, attorney or a city attorney or any other proper officer or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and the identity of the named board, commission, department, agency, or officer through which or through whom suit is to be filed against.

Appendix A

§5108. Prescription, immunity; pleas

The defendant in any suit filed against the state of Louisiana, a state agency or a political subdivision of the state shall not be entitled to file a plea of prescription or peremption barring such suit or the liability of the entity instituting the suit if the suit in contract or for injury to person or property is filed within the time fixed by law for such suits against private persons, or in other suits authorized by the legislature if the suit is filed within one year after the date on which the resolution authorizing it was adopted or within one year after the date on which the law authorizing it becomes effective.

§5109. Authority to compromise; judgments; payment

A. In any suit filed against the state of Louisiana, state agency, or a political subdivision, the defendant, or the proper representative thereof, upon the advice and with the concurrence of the attorney general, district attorney, city attorney, or other proper official, as the case may be, may compromise and settle the claims presented in any such suit.

B. Any judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision.

Appendix A

§5110. Suits and proceedings exempt

This Part shall not apply to suits for refund of taxes or for workmen's compensation benefits, or to proceedings for garnishment of wages, or to suits or mandamus proceedings against the division of public health statistics, vital statistics, of the division of public health of the Louisiana Health and Human Resources Administration, all of which shall continue to be governed by the laws applicable thereto.

§5111. Appropriation of property by state, parish, municipality, or agencies thereof; attorney, engineering and appraisal fees; prescription

A. A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding. Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding. Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.

B. The rights of the landowner herein fixed are in addition to any other rights he may have under the constitution of Louisiana and existing statutes, and nothing in this Part shall

impair any constitutional or statutory rights belonging to any person on the effective date of this Part.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved by the Governor: July 17, 1975.

Published in the Official Journal of the State: August 5, 1975.

A true copy:

WADE O. MARTIN, JR.
Secretary of State.